SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 815

ELMER DAVIS, JR., PETITIONER,

vs.

NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. a]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

Spring Term 1960

26th District

No. 217

STATE OF NORTH CAROLINA

vs.

ELMER DAVIS, JR., Defendant

FROM MECKLENBURG

Before CAMPBELL, J., December 7, 1959, Regular Criminal Term, Mecklenburg Superior Court. DEFENDANT Appealed.

DEFENDANT'S STATEMENT OF CASE ON APPEAL

This was a criminal action tried at the Regular Schedule A December 7, 1959, Criminal Term of the Superior Court of Mecklenburg County, before his Honor Hugh B. Campbell, Judge Presiding, and a jury. From a verdict of first degree murder and the sentence pronounced thereon, the defendant appealed to the Supreme Court of North Carolina.

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[fol. b] IN THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

Nov. 2nd Term, 1959

No. 31045

INDICTMENT

The Jurors for the State upon their oath present that: Elmer Davis, Jr., late of the County of Mecklenburg, on the 20th day of September, 1959, with force and arms, at and in the County aforesaid did unlawfully, willfully, feloniously while perpetrating a felony, to wit: rape, kill and murder Foy Bell Cooper against the form of the statute and in such case made and provided and against the peace and dignity of the State.

James E. Walker, Solicitor.

The bill was returned by the Grand Jury as a True Bill.

PLEA, JURY AND VERDICT

Before the impaneling of the jury on Monday, the 14th of December in the second week of the December Term, the Solicitor for the State announced that the State would seek the Capital verdict of murder in the First Degree.

And afterward, to wit, the same term of the said Court, before the said Hugh B. Campbell, Judge, came the same Elmer Davis, Jr. in his proper person, and having heard said indictment read, he says that he is not guilty of the crime charged therein, and of this he puts himself upon trial by his God and his Country, and James E. Walker and Kenneth Downs, who prosecutes for the State, do the like.

Thereupon, the following jurors, to wit, Frank E. Horne and 11 others, being chosen, sworn and impaneled, upon their oath, say that the said Elmer Davis, Jr. is Guilty of Murder in the First Degree.

IN THE SUPERIOR COURT OF MECKLENBURG COUNTY

Criminal Term

No. 31045

[fol. c] STATE OF NORTH CAROLINA

vs.

ELMER DAVIS, JR., Defendant

JUDGMENT—December 18, 1959

Elmer Davis, Jr., you have been indicted, tried and convicted by a jury of your county for murder in the first degree of Foy Bell Cooper. Upon the return of the verdict of the Jury, the Clerk of the Superior Court caused the Jurors to harken to their verdict as the Court has it recorded, and thereupon, no juror retracted the verdict or dissented in any way, thereafter the jury and each of them was polled pursuant to a request from your counsel, each juror upon being polled stated that the verdict of each juror respectively was guilty of murder in the first degree, the law prescribes under General Statutes N. C. Section 14-17, that the punishment for your crime is death, the Judgment of the Court therefore is that you will be remanded to the common jail of Mecklenburg County to there remain until the adjournment of this Court.

It Is Further Ordered and Adjudged by the Court that the high sheriff of Mecklenburg County in whose custody you now are, will convey you to the North Carolina penitentiary at Raleigh, N. C., and deliver you to the warden of the said penitentiary.

And It Is Further Ordered, Adjudged and Decreed that you remain in custody of the said warden until Friday, February 26, 1960, and that on said date between the hours of 10:00 in the forenoon and 3:00 in the afternoon, that you be taken by said warden to the place provided for execution in said penitentiary.

And It Is the Further Judgment that the said warden, deputy warden or such other person as may be designated according to law then and there take you, the said Elmer

Davis, Jr., into the permanent death chamber which has been provided in the said penitentiary and then and therein cause you to inhale lethal gas of sufficient quantity to cause death to be administered to you, and to continue said in- [fols. d-f] haling of said gas by you until you are dead, and may God have mercy on your soul.

Dated this 18th day of December, 1959.

/s/ Hugh B. Campbell, Judge Presiding.

APPEAL ENTRIES

Upon the coming in of the verdict, the defendant moves to set aside the verdict as being against the greater weight of the evidence, and for a new trial. Motion overruled and the defendant excepts.

The defendant moves for a new trial as a matter of law for errors committed in the progress of the trial. Motion overruled and defendant excepts.

Judgment pronounced as set out in the record. To the judgment as pronounced, the defendant objects. Objection overruled and the defendant excepts.

The defendant appeals to the Supreme Court of North Carolina, upon errors assigned and to be assigned. Notice of appeal given in open Court. Further notice waived.

By consent and in the discretion of the Court the defendant is allowed 45 days in which to prepare and serve case on appeal, and the State is allowed 15 days thereafter to file exceptions or serve counter case.

Appeal bond in the sum of $ adjudged sufficient.

Appearance bond fixed in the sum of $ no bond.

This the 18th day of December, 1959.

/s/ Hugh B. Campbell, Judge Presiding.

[fol. g] IN THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

STATE

VS.

ELMER DAVIS, JR.

DEFENDANT'S PRAYER FOR INSTRUCTION

If the evidence produced in the trial of this case has proven to you beyond a reasonable doubt that the defendant murdered the deceased in the perpetration of a felony "Crime Against Nature" and has failed to prove to you beyond a reasonable doubt that the deceased was murdered by the defendant in the perpetration of a felony "Rape", then it would be your duty to return a verdict of Not Guilty.

/s/ Charles V. Bell, /s/ W. B. Nivens, Attorneys for the Defendant.

Tendered in apt time and to the refusal of the court to give same the defendant objects and excepts. (Defendant's Exception 20)

/s/ Hugh B. Campbell, Judge.

(Written in the hand-writing of Judge Hugh B. Campbell.)

NORTH CAROLINA,
Mecklenburg County.

CLERK'S CERTIFICATE

I, J. Lester Wolfe, Clerk of the Superior Court of Mecklenburg County, do hereby certify that a regular term of the Superior Court of the said County was held in November, 1959, and the Grand Jury, which was properly formed, returned a true bill against Elmer Davis, Jr., a copy of which is in the foregoing record proper; that a regular term of the said Court was held in December, 1959, and Honorable Hugh B. Campbell was presiding Judge; that the case of State against Elmer Davis, Jr. was tried before Judge Hugh B. Campbell and a duly constituted and im-

paneled jury, and the verdict rendered that the defendant was guilty and the judgment rendered thereon appears in the record.

That the defendant gave notice of appeal in open court to the Supreme Court of North Carolina, and upon proper affidavit filed by him, Court ordered that he be allowed to appeal in forma pauperis. Said order and affidavit is in-
[fols. h-6] cluded in the foregoing record.

That said record constitutes the following items: Defendant's Statement of Case on Appeal; Organization of Court; Bill of Indictment; Plea, Jury and Verdict; Judgment and Appeal Entries; Affidavit to Appeal in Forma Pauperis; Order; State's Evidence; Defendant's Evidence; Charge of the Court; Assignments of Error; Acceptance of Service; Agreement of Counsel, Defendant's Request for Instructions.

Witness my hand and official seal, this the 20 day of July, 1960.

/s/ J. Lester Wolfe, Clerk of the Superior Court.

[fol. 7] IN THE SUPREME COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

Transcript of Evidence

J. B. NEWELL testified as follows:

By Mr. Walker:

My name is J. B. Newell and am a lieutenant in the Charlotte Police Department. I have been with the department for nineteen and a half years.

I answered a call to the Elmwood Cemetery or Pinewood Cemetery approximately 5:12 p.m. on the 20th of September. It is really all one cemetery, there is a fence that divides the colored from the white sections and I learned on that date that the colored section was known as Pinewood and the white known as Elmwood. I got there about 5:20. I observed the body in this mausoleum and kept the crowd back until the coroner came down. I checked and in my opinion she was deceased.

I saw Ronald Earl McCauley and Kadell Jackson, Jr., but I don't recall Steve Cowick. There were about twelve or fifteen people there when I got there. Before the coroner arrived we saw the body through a hole in the bottom of the door which is about ten by eighteen inches or ten and a half by eighteen. After the coroner arrived we broke the lock on the door. This photograph accurately portrays the Jones Mausoleum and the door just described. Dr. Summerville arrived about 20 to 30 minutes after I arrived. I did not move the body in any way before Dr. Summerville arrived.

After the coroner came, we made photographs, then we entered and Dr. Summerville examined the body. This body [fol. 8] was laying as you would enter it would be to your left with the feet to the left of the door near the left hand wall as you enter the door, face down, and feet near the door, so when we entered of course we turned the body over.

This photograph, marked State's Exhibit No. 4, is the body as it was before it was moved in the mausoleum. This photograph accurately portrays the position of the body when I found it lying there.

When we turned the body over, we observed that there

was blood on the face, all about the face, a gash or wound in the left side of the head above the ear, bruises about the face. There was a sweater with one of the sleeves stuffed in the lady's mouth and she had on a dark colored coat or short coat or jacket. State's Exhibit No. 5 accurately portrays the body of the deceased after it was turned over. (State's Exhibit No. 4 and 5 were introduced in evidence.)

(Court recessed)

Lt. J. B. NEWELL returns to the witness stand.

By Mr. Walker:

After the identification officers arrived and the doctor examined the identification getting what evidence he could, we removed the body. It was taken to Miller & Kerns Funeral Home on Hawthorne Lane about 6:00.

Cross examination.

By Mr. Bell:

When I arrived there were about twelve or fifteen people there. I did not talk to any of these young men or boys who were on the stand this morning, but Officers Teeter and Bowen and the detectives talked to them. The officers talked to one of these men who were out there drunk. I do not know whether he was taken down to the jail for questioning. I do not know if any effort was made by the police department to apprehend the other man. I did not make any effort to apprehend the other man, it was the officer's job. They had information that he had gone to South Carolina, and why they did not go get him I don't know. I am not too familiar with the location of the cemeteries, but I have personally got a few hobos and drunks and vagrants from there. They sleep out there and lie around. [fol. 9] There are a number of smokers hang around out there as you will find in any other woods area around town. The other officers talked to the other young colored men out there, but to my knowledge those younger boys were not brought to the police department for questioning. I think the detectives and other patrolmen talked to every

witness that was mentioned. There were a number of people brought in for questioning.

Redirect examination.

By Mr. Walker:

I work in the Patrol Division of the Charlotte Police Department, but after the body was found and the initial investigation made, this case was assigned to the detective division. We were all responsible, but the detective division was in charge of it.

Recross-examination.

By Mr. Bell:

As in any other case, all of us are responsible for obtaining information that we can get.

(Witness excused)

DR. W. M. SUMMERVILLE testified as follows:

By Mr. Walker:

My name is Dr. W. M. Summerville and I am the Mecklenburg County Coroner. My office is located at 610 Professional Building and one at 301 Doctors Building, and one at 203 Hawthorne Medical Center. My specialty is pathology. (It is stipulated and agreed between counsel representing the State and counsel representing the defendant that Dr. W. M. Summerville is a medical expert specializing in the field of pathology.)

On the 20th of September, 1959, I responded to a call to go to the Elmwood Cemetery or Pinewood Cemetery. I received this call at approximately 5:00 p.m. on Sunday afternoon, and I arrived shortly thereafter. After arriving at the cemetery I went to a mausoleum in the Pinewood part of Elmwood Cemetery and went to the Jones Mausoleum. Upon my arrival I found six crypts, three on each side. That is where you place the bodies in a mausoleum. I found also lying on the floor the body of an elderly woman which was later identified as Mrs. Foy Bell Cooper. This photo-

graph, marked State's Exhibit No. 4, is an accurate portrayal of the body of the deceased lady at the time I [fol. 10] found her. She was lying partially on her left side. I think I turned the body over myself. This photograph, State's Exhibit No. 5, properly depicts and portrays the body of the deceased after she was turned over. I found a wound around her neck, bruises on her neck and knees and there were several minor abrasions of the body. There was a towel or scarf stuffed in her mouth. There was a deep depression around her neck.

I later examined the body after my initial examination, but found no other injuries to the body. I made my subsequent examination at Miller & Hovis Funeral Home. The body was transferred from Miller & Kerns to Hovis Funeral Home. I examined her at the funeral home on September 21st, which would be the next day, at which time I performed an autopsy. The body was examined primarily. There were photographs made at the time I performed the autopsy. These pictures were made by members of the police department. To the best of my recollection, I saw her at both funeral homes. This photograph, marked State's Exhibit No. 6, is a true representation of the body as she lay there in the funeral home at Miller & Kerns.

This photograph, marked State's Exhibit No. 7, accurately and properly portrays the upper portion of the deceased body as she lay there on that same day. This photograph, marked State's Exhibit No. 8, accurately and properly portrays the left side of the deceased head as she lay there on that day. The hands in the photograph are possibly mine.

My finding is that death was caused from injuries, multiple, extreme. There was a depressed area around the neck which in my opinion was produced by a cord or rope. There was a large bruise around this area on the neck, the left. This is the external examination. The left ear, left side of neck and face presented large bruised areas. There was a laceration or cut measuring one and one-half inches in the left frontal area, that would be the left side of her head which was demonstrated in the photograph. There were scratches or bruises or abrasions, whichever term you prefer, of the knee, the largest measuring three-fourths of one inch. There were three bruises on the right

[fol. 11] knee and four on the left knee. There were two small bruises on the left anterior shin bone. Those are the significant external findings.

Further findings on turning the back scalp, showed a number of bruised areas beneath the skin in the tissue which separates the skin from the bone, the largest of these measured three inches in diameter. There was an area of hemorrahage in the muscles or bleeding in the muscles on the right side of the head, we call the temporal muscles, that part is the muscles that are right above the ear. On removing the bony part of the skull, I found no fractures but there was a hemorrhage beneath the covering of the brain on the left hand side. There was also blood in the little pocket we call the ventrical or pockets which are normally present in the brain. Other organs were essentially normal except changes I would expect in a woman of this age. The left kidney however was small than normal, and there was a kidney stone, a big kidney stone in this kidney, with changes which normally accompany what we call a staghorn stone. The genetive organs as one might expect in a woman of the age showed changes which one would expect to find. On examining the bony structures, the second and third rib on the right side were fractured near the sternum. On the left hand side the third rib right above the heart was fractured just outside the breast bone. The other examination I made, I did a vaginal wash on this Mrs. Cooper. In other words, I used a syringe and washed out her vagina.

Based on my examination of this deceased lady, my opinion as to the cause of her death is injuries multiple, extreme. There was several injuries which might have caused her death. It is my opinion that she died from strangulation.

In her vagina I found spermatizoma or sperms, which in the layman's language means male injector. They have to be male because a lady does not have any sperm. They have what we call ova. I made a very careful examination of her inner thighs and I found no lacerations, I mean scratches, that is on the inner thighs, nothing that would bring blood. [fol. 12] But on examination of the vagina or the vaginal walls, the recosa or the lining was rather red. This would indicate simply that she had an intercourse. I do not have

an opinion as to when this intercourse would have taken place based on my physical findings. (The photographs marked State's Exhibit Nos. 6, 7, and 8 were received in evidence.)

This is a photograph, marked State's Exhibit No. 9, made by me in the presence of Captain McCall and Lieutenant Hucks and Mr. Fesperman on September 21, 1959 at 11 A.M., at Hovis Funeral Home. This represents the examination of the neck with the hemorrhage which was beneath the wound around her neck.

On examining the neck at the autopsy, I found emerced in this depressed area a tremendous amount of hemorrhage around the portion of the Adams Apple. There was a small crack in the Adams Apple. In my opinion, it would take a moderate amount of pressure at the minimum to cause this strangulation.

Cross-examination.

By Mr. Bell:

From my examination, my opinion is that the deceased had been dead maybe an hour to two when I arrived.

I examined the sperm and from my examination it had been put there by a person in adolescence at least. A spermotoom is not ejaculated or not spread until a boy becomes a man or the stage of adolescence. A youngster could not do it unless it is artificial insemination. But I could not determine the age. I could not tell whether the person was forty years old, sixty years old or ten years old. A boy from ten on up could be fertile. The sperm could have been there two or three days. The average life of a sperm in the vagina is about two to three days. Of course these sperms were not examined, they were not moving. Of course by washing out with the solution which I used, we attempted to demonstrate the presence of sperms, not living sperms. The washing was taken the next day.

The wounds I found were produced by external violence. The age of the person I certainly cannot say.

(Witness excused)

[fol. 13] C. M. Sykes testified as follows:

By Mr. Walker:

My name is C. M. Sykes. I am a lieutenant in the detective division of the Charlotte Police Department. I am a lieutenant in command of one shift and Captain McCall is in charge of the other. I have been with the department twenty-four years.

On October 6, 1959, I talked with the defendant, Elmer Davis, Jr. in the offices of the detective bureau on the second floor, at approximately 12:30 or 1:00 o'clock.

By Mr. Walker:

Q. Tell what your conversation was with the Defendant?

Mr. Bell: Object to that.

The Court: Overruled.

(Defendant's Exception #1)

Mr. Walker: Before we get into an argument, can we let the jury go out.

The Court: Members of the jury, you may step out into the jury room.

Whereupon, the jury retired from the Court Room.

Mr. Bell: Your Honor, we respectfully request the Court to have permission to preliminarily examine the witness to ascertain whether this is true or not.

The Court: All right.

Mr. Walker: We have no objection.

Cross-examination.

(In absence of the jury)

(Here begins the inquiry as to the voluntariness of the statement allegedly made by the defendant, Elmer Davis, Jr.)

By Mr. Bell:

I am a member of the Charlotte Police Department. I have been a lieutenant approximately nine or ten years. I have been on the police force twenty-four years the 25th of this coming February.

I talked with this man on October 6th on the second floor of the Police Department in one of the offices of the Detec-
[fol. 14] tive Division. He was brought from the city jail. The defendant was brought to the Mecklenburg County jail about the 8th of October. He was brought from the city jail to the detective division office. I was on vacation at the time he was actually brought to the city jail, and I did not return to work until the 5th of October, 1959.

The paper you handed me is a copy of the police department arrest, what we call an arrest sheet or an arrest draft. This is a photostatic copy thereof. I have never seen the original arrest sheet.

This man made certain statements to me. Some of the statements that were made by the defendant were made in my presence alone and some were made in the presence of Detective Hucks and Detective Fesperman. I don't recall seeing him sign anything or requesting him to sign anything. I recall I signed a statement that was read in his presence but I do not recall him signing the statement. I do not know who requested him to sign it. I signed it after the statement was read to him and this was asked him, if that was true and he said it was. I don't know whether I signed my name before he signed his. The statement was read to him by Captain McCall. Captain McCall asked him if that was correct and he said it was. Then I signed it. I could not say whether the boy's name was on it at that time or not. I do not know whether I signed my name to the paper before the defendant or not because I do not recall when he signed it, so I could not say. There was another officer's name there when I signed, but I do not recall when I signed. I signed the top line. There was possibly one other name on it before I signed. I do not recall the name. I signed it because the statement had been read to him and he said that the statement was correct and I only witnessed as far as I am concerned, the part that he said the statement was correct. I did not see him sign it so I could not say whether it is a written signed confession or not. Everything that was said in my presence is included in the paper writing.

[fol. 15] Mr. Hucks and Fesperman brought him out of the jail. They did not ask me to talk to him. The reason I talked with him was when they brought him in, I was sitting

at the desk that I usually sit at in the front, they brought him by and started to mill him over and I asked Mr. Hucks if I could come in and on their part of the interview because I had not talked with Davis, and very little discussion had I had with any of the detectives with reference to this case being I had just returned from vacation, and they said it was all right or they had no objection. I do not know whether this man had been allowed to talk to anybody or whether he requested the police or detective members of the detective division to be allowed to communicate with some of his people. I do not know whether he had requested additional food to eat or whether he was being held incommunicado. At the time I talked to him he was not being held incommunicado and as far as I was concerned, was free to talk to anybody, but he was not free to walk out of jail because as far as I know he had been arrested and was in custody. He had been arrested when I talked to him, but I do not know what he had been charged with.

I don't know as I said I wanted to interrogate him. I asked Mr. Hucks if I could go in with him and interrogate him. I wanted to get on to the case and know something about it. I had not known anything about it, I had been out of town. I don't think I asked anyone what he had been charged with.

The case was not assigned to me, the men assigned to the case were on the opposite shift from me at this time and my understanding is when I came back they had been assigned to this case and worked at the hours that were necessary to work. I do not know who signed the arrest sheet when he was brought in.

He told me after I had talked with him that he had killed a woman in the cemetery. He told me how he had gone into the cemetery, that he came over a fence, came up behind her and grabbed her from behind and choked her and [fol. 16] dragged her behind a tombstone and threw her, taken her behind the tombstone and threw her down on the ground, and that after having relations as he put it by mouth with her, he picked up the body, went through a hole in the fence and carried her down to, he described it as a little house. And then I asked him if he would be willing to go with Detective Hucks and Fesperman and myself out to the cemetery and go over this thing as he could

recall it the best he could recall it, and he said he would be glad to do that.

I did not put down all of that in writing. The paper writing was drafted in the afternoon, I will say 5:00 or 5:30. I was present when the paper writing was drafted. For the purpose of the Court, I may go back just a little before he told me this. We went into the room with Detective Hucks and Fesperman and Davis. Mr. Hucks and Mr. Fesperman and Davis and myself, there were four of us in the one room. When they started talking with him in a routine talk of going into the cemetery, etc., at that time he denied any knowledge or of anything that they may have asked him in connection with this murder. This was the first time I had seen him or talked to him. I do not know whether he had been interrogated before this in reference to this thing. In my opinion he had been, he had been talked to by someone, how many and who I don't know. I was not present so I do not know whether he was under fear or whether he had been threatened or whether he had been promised leniency or hope before being brought in from the jail. My opinion is that he had eaten that day which is sandwiches. That is what they serve over there. That is all that is furnished by the City of Charlotte. They furnish them twice a day. I think each prisoner gets two sandwiches, however some prisoners may not take but one so some may want three and I think they are entitled to it and do get three if they want them.

The reason I asked him to go out to the cemetery with us was from what he had told me, I felt that it would be much clearer and better understood about it if he would go, that he could take me and show me exactly.

[fol. 17] Elmer Davis, Jr., testified as follows:

By Mr. Bell:

My name is Elmer Davis, Jr. I did not murder Mrs. Foy Bell Cooper. I signed this paper writing (referring to second sheet of purported statement,) but this other paper writing (referring to the first sheet of the purported statement), I have never seen. No one ever showed that one to me. I can read a little bit. No, I can not read. I never did read this statement. No one ever did read this paper

writing to me. They read some paper but I don't know what it was about. I don't know which one it was. I signed this paper because he told me to sign it. I signed this paper so I could come to the City Jail and get something to eat and take a hot bath. That gentleman back there said, 'Davis, go in there and sign that paper so you can go to the County Jail and get something to eat and get a hot bath", and I went on and signed it. I stayed in the City Jail about three weeks. I had been over here (referring to the City Jail) at least three weeks or more before they asked me to sign this paper. During the course of these three weeks, two more detectives talked to me. They would talk to me sometimes twice a day. I had refused to confess to this crime for three weeks.

They came to Belmont to get me. They did not say anything, just put the handcuffs on me and put shackles on my leg and took me out there and put me in a car. When the officers picked me up in Belmont they did not tell me what they picked me up for nor did they tell me that the Charlotte Police were coming over to get me. When these men presented themselves at the Belmont jail, they asked me did I stay over there and I told them yes, I was born here in Belmont, I was over there visiting my aunts whose names are Jenny Davis and Gertrude Erwin. They live out in the country.

When they brought me to City Jail, I don't know if they signed a warrant or not. Concerning when they began to talk to me about this case, it was two officers already talked to me about this case, started before these other people got on to it and this was done in Charlotte at the City Jail. They asked did I kill that woman, and I asked them which woman are they talking about, and they said the one out there in the cemetery. I told them I had never been to that [fol. 18] cemetery since I have been back. They talked to me the next day and they talked to me every day from the time I got there until I signed this paper. I do not remember the date I put my name on the paper.

I told them I would like to get something to eat, and call my sister so she could bring me something to eat, and they put me way upstairs in a room off by myself, where nobody could come up there and see me. I stayed upstairs about two weeks and downstairs about a week. In these two

weeks, I had nothing to eat but sandwiches, I was hungry. Mr. Hucks gave me my first meat after being in jail almost three weeks. I had not signed the paper when Mr. Hucks carried me to his house. Mr. Hucks did not promise me nothing when he carried me to his house and gave me something to eat. He carried me to his house and gave me sausage and coffee and some butter, I think. At the time he carried me to his house, he asked me was I hungry and I told him yes, and he said, "Well, we are going to feed you this morning", he said, "We have got a trip to do". He carried me back up in the mountains where I escaped from, looking for the place where I took some clothes and things up there and he told me he could not find them and he put me in the county jail and I stayed over there that night. I got something to eat in jail that morning, over in Asheville, N. C. It was not a sandwich but it was food in a plate.

Captain McCall told me, "Davis, he said, 'Go ahead and sign the paper because we have got to get this case cleared up, you understand." I told him I had not committed the crime. I signed because I wanted to get over here and get something to eat. When I signed the paper I did not think I was confessing to any crime. They read something to me, I could not understand it, but they did not read anything in reference to killing this woman. I did not sign the paper because I had killed her. About three or four people were in the room when I signed it. I was afraid somebody in there would try to kill me. The man over there in the gray suit told me, "I determined to fram the hell out of you if you don't tell me something", and I said "what", he said, "I fram the hell out of you if you don't tell me something". He started talking about that grave yard out yonder and they asked me would I go to the grave yard [fol. 19] with him, and I told him yes, I had no fear for going, and I said, "If you all people want me to go out there I will go out there with you." I think all three of them carried me out there. When we got to the grave yard, they told me right here, "Davis, is that where that woman was sitting". I said, "I don't know nothing about the thing", I said, "I don't even know where she was sitting or nothing at all", but they said, "We are going to show you", and they did. There was a rock bench sitting

up down there and they told me right here where she came to visit some people what was dead, some relatives of hers. They asked me, "What is the last time you had been out here," and I told them, "I ain't never been out here about nine years or something and the time I was making time up here and they said, 'How did you get the body across the fence," and I said, "I ain't put nobody across the fence", and they said, "We have got the body in the morgue down there" or whatever you call it. They carried me to the morgue and asked me had I seen it, and I said "No, I ain't been in that morgue". So they brought me back to the jail house.

I got a pair of shoes down near this place from a guy laying over there drunk. I got them on Saturday. They were laying over there in the grass, but not in the grave yard. I took the shoes because the shoes I had on was too heavy.

While I was out there with the officers, they asked me, "Davis, what about showing us your clothing and things", and I said, "Yes, the clothes what I pulled off" I say, "There ain't no harm in me showing you my clothes I pulled off", and I went down the P & N Railroad track. That was not in the grave yard. I showed them where I stole the clothes where I changed. I changed to civilian clothes. I got them up in the mountains. I pulled off a sort of black looking pants and a shirt which I had gotten up in the mountains. I got the clothes that I put on out on the P & N Railroad on somebody's clothes line. That was the same day I got the shoes—that Saturday. I didn't go to the grave yard that Saturday. I seen quite a few drunks and hobos down there that Saturday I went down there. There were about four people out there the day I was there.

I have stayed in the Mecklenburg County Jail since I was brought over there. They feed you something up there, sausage and eggs and biscuits and coffee. They feed three times a day. They don't serve sandwiches up [fol. 20] there. The food is hot.

When I put my name on that piece of paper I was afraid of them, what them people are going to do on account of that being a white woman. That man said, "I will fram the hell out of you".

Cross-examination.

By Mr. Walker:

I was an escaped prisoner at the time I was arrested by the Belmont police. I said I had not been in the grave yard since I had been making that time. They say I was convicted of rape or assault with intent to commit rape on some woman near that same grave yard. That was what I was making time for. I was confined in a felony camp in Haywood County and I broke out. I came to Charlotte. Concerning whether or not I lived in Charlotte, well my father was, yes. My father's home is near this grave yard that we are talking about. As a matter of fact it is just on the east side of my home. You can see the white folks grave yard from my house. I had escaped from prison serving for a felony and I did not expect them to turn me loose when I got through talking. I knew they were holding me as an escaped convict. I knew that was the reason they were holding me. When they were holding me they talked about everything. They talked to me about the clothes I had on. I told them that I got them off of some clothes line up between Canton and Asheville, North Carolina, and that I stole them, that is, the clothes I had on when I came to Charlotte. Those were the clothes I was wearing when they arrested me in Belmont and brought me to Charlotte.

Concerning whether or not they said, "Well, we will take a trip up there" and whether or not they furnished me a hot meal the day I got ready to go up there, I told about that. And for lunch that day I got a hot meal in that jail. I did not eat no supper in the Asheville jail that night because they had done fed up. I asked for something and they said, "You will have to wait until tomorrow morning". These officers and I walked on the railroad tracks all of the way from Canton to Asheville. And as to whether or not I was ever able to show them where I said I stole those clothes, the man had them in the hill, I could not hardly tell where. I told them before all about the building and where it was and every-

[fol. 21] thing else. And as to whether or not, when they took me up there I could not find it, I did not tell about no building. It is a few houses up there unpainted.

Concerning what I told them, I told them it was sitting back up in some woods. I admit that I robbed some fellow that was lying drunk down near the railroad tracks. That man did not have nothing, he had nothing but his shoes and his bill fold is all. I had no right to do it. He was lying within fifty or sixty feet of the grave yard. It was not done on Sunday. The reason I took the shoes, I wanted to get rid of the convict shoes—they were heavy. Mr. Hucks did not mistreat me. He was alright. I ain't got no complaint about him. He never did anything wrong to me. Mr. Coy Sykes did not use force and hit me. He did not lay his hands on me. He threatened to fram me. This was in his private office. He was the only one in there. Mr. Sykes asked if I would like to talk to him in private and out of the presence of these other officers who were sitting there, and so Mr. Sykes and I went into a separate room. I don't remember that the first thing Mr. Sykes said when I got in the separate room was, "Let's bow our heads and have a word of prayer". I will swear it did not happen. The first thing he said, "Davis, I heard about the case," he said, "From the other officers." He said so much I can't remember.

Q. Now, Davis, I want you to tell word for word the conversation that took place between you and Lieutenant Sykes from the time you walked in his private office until you walked out?

A. He said, "Davis, have you ever been to the cemetery", and I said, "Yes, I used to go through there sometimes when I was small to go to the ice plant over there beside the railroad", and he said, "The woman that got killed over there, do you know anything about it." And I said, "No, I don't know nothing about it". And he said, "Well, the officers are going to take you over there as soon as we get through and at least I reckon they done probably been over there", and he asked me would it be all right. So they carried me down to the place. Down to, you call it the small something place," and they said, "that woman". So he said something, I don't remember. He also asked me, "Did you strangle that woman", and I said, "No, I did not strangle her," and he said, "Somebody did", and I said, "I ain't been about the cemetery [fol. 22] since I left the chain gang", and he said, "Some-

body got to take the blame for it", and he said, "It just as well be you, you understand," and I said, "Why you can't put that stuff on me like that", I said, "I got too much time now". So there was a heap more, I could not say. I could not keep the rest of it on my mind. I could keep that part. I told him I did not do it. He took me to the cemetery and I told them I did not do it. When I came back I told them I did not do it. They prepared some sort of a statement and Captain McCall told me to sign it. They read something to me. My hearing is alright. I remember some of what they read to me. I understand what you are talking about. I understand my lawyer. I did not understand what they said when they read the statement to me because they did not read but one page. Concerning whether or not they just read about five lines, that was the page that I signed. I did not hear that part that said, "In closing I want to say this, I have known in my mind that you people were holding me for all the time I have been lying in jail, it has been worrying me and I know sooner or later I would have to tell you about it. I have made this statement freely and voluntarily. Captain McCall has discussed this statement in the presence of the Detectives, W. F. Hucks, E. F. Fesperman, H. C. Gardner, C. E. Davis and Detective Lt. C. M. Sykes. I am glad it is over because I have been going through a big strain".

I did not hear that part about killing the woman. They said she had been strangled. I did not tell them I did it. I was feeling alright when I walked into Lt. Sykes' office. I feel alright today. I am in good health. I was just hungry that's all. I get pretty good eats now. I was hungry back then at the time over yonder in the jail. I told Mr. Hucks I would like to have something to eat. Well what is two sandwiches. Sometimes I got one sandwich and sometimes I got two. I got two sandwiches at twelve and one at six o'clock. Man, I just told you that I got two at 6 o'clock. I know Mr. Hucks. Well, I ain't going to sit here and say he brought me something from outside. I told you he gave me something at his house, but on other occasions he did bring me some peanuts and stuff like that. He brought us peanuts after I made a statement to Lieutenant Sykes. Mr. Hucks brought me peanuts and stuff like that all along, but that was not filling me up. He

[fol. 23] brought me cigarettes. I was not mistreated by Mr. Hucks. My weight came down to 151. I don't know what I weigh now. I am pretty good size at the time being. I told them I took a wash-off one time over there—the time they were fixing to carry me to the mountains. It was not a full bath. It was a sponge. The time I spent in the City was three weeks or something, and as soon as the investigation was completed, I was transferred over here to the county jail in this building. I don't get all I want in this jail, but enough.

I get all I want in some jails. I have been in three jails, this one and the one back up there where they kept me that night in Asheville. I wanted a bath and some hot food so bad that I confessed, and I was scared what they would do over there. Being in jail scares me sometimes. Yes, I have been in a lot of jails. I haven't been in jail for something I didn't do but this time. I have served time for some things I didn't do and somethings I did do. I was convicted and served two years on the gang in 1943. I was convicted in 1944 and served twelve months for breaking and entering, I did not do that. In 1946 I was convicted on two counts for house breaking and larceny and fined $2,000.00 in each case. Then in 1946, about two weeks later, I was convicted again of breaking and entering and larceny, and given four to five years. I escaped after four months. Here they caught me and brought me back to Huntersville, but I was not given any more time. At that time they were not giving out time like they are now. In 1950 I was convicted for assault with attempt to commit rape and robbery and given 17 to 25 years and I escaped. Concerning whether or not I escaped once before this time here, the time I am on, I give up then. They don't call that escape. I just went back, I left the same day. I left and I give up to some people over there in Tennessee the same day. Then here in 1959, in July of this year, I escaped again. As to whether or not I was given six months extra for that, that is the same time. Then I went back again and escaped again in September, and that is when I was picked up in connection with this case we are trying right now. I have been to Raleigh, in Raleigh Central Prison. I was in Raleigh August past to be reclassified. In solitary con-

[fol. 24] finement they give you canned stuff, you get more

than bread and water now. Yes, I have been in solitary confinement.

I never talked to Chief James. He just come in with a book and walked out. No, he did not take me in there and talk to me and ask me if I were mistreated in any way and if any of the officers had mistreated me in any way, and if so to tell him who it was. I did not know he was Chief. The first time I ever saw him was the other day at the City Jail. As to whether or not it was the day I signed the paper, that is the time I—know, I don't know if it was or not.

Redirect examination.

By Mr. Bell:

My standard weight is 167 pounds. At the time they weighed me over there after being in jail three weeks, I weighed 151 pounds. Since I have been in the county jail, I have picked up weight. I done get a heap larger.

Recross-examination.

By Mr. Walker:

I have not weighed in the county jail. I was weighed in the city jail at the time they fingerprinted me, but not when I was brought in.

The Court:

The time they fingerprinted me is the time they weighed me. At that time I weighed 151 pounds.

Mr. Walker:

That was not at the time they brought me in.

The Court:

They only weighed me one time.

(Witness excused)

Chief JESSE JAMES testified as follows:

Direct examination.

By Mr. Bell:

I am Chief of Police for the City of Charlotte. I know about the Elmer Davis case. I was told that he was in custody in Belmont jail. I brought him over here because he was an escaped convict. He was brought to Charlotte because of the fact the records revealed that this man was arrested and he was brought here for questioning. He was not necessarily brought to Charlotte to be questioned about [fol. 25] this rape case. I say he was an escapee, and he was arrested.

Captain McCall told me that he had received a call from Belmont that an escaped rapist was there in jail, and that I was told, he told me this man was coming back, an escaped convict, and that was the only conversation to the best of my memory that took place, Captain McCall and I.

We have hundred of cases. I found out this afternoon that he had been in the city jail approximately three weeks before the warrant was signed. I will tell you my method in the Charlotte Police Department, every man has a right to be told what he is charged with and it is my policy and my desire that any man that is placed in the city jail by the police department that he shall be told what he is charged with, if he wants to see relatives or friends or lawyer, that will be available. Now in this case, this man is an escaped convict I told you that, and Mr. McCall was handling the case, and that is all the knowledge I have of it in that respect. It is not unusual at all to keep a convict in jail for a long time who is an escaped convict, and I think you will find throughout the State that it is not unusual at all.

Q. Well now, in other words you think that the Chief of Police——

The Court: Let's get down to the case we are trying. You keep talking about long periods of time that this man was held in jail. The evidence in this case so far reveals that this particular crime occurred on September 20, 1959. Have you any evidence at all as to when he was arrested?

Mr. Bell: Yes, I have the record.

The Court: He certainly was not put in jail before this crime was committed.

Mr. Bell: No.

The Court: When was it, you can state it, can't you?

Mr. Bell: This warrant was signed the 7th day of October, 1959.

The Court: The 7th day of October?

Mr. Bell: Yes.

The Court: When was the man put in jail?

Mr. Bell: He was put in jail on the 21st day of September, 1959.

The Court: That is only two weeks and two days.

[fol. 26] Mr. Bell: Yes, two weeks. Chief, you are familiar with this statute, are you?

A. You will have to show it to me, Mr. Bell, so I know which one you are talking about.

Q. 15-47?

A. Mr. Bell, I would like to answer this Sir if I may by saying——

Q. Will you answer my question and then explain?

A. Well, I can't, Your Honor, answer this question yes or no, it is like asking if I quit whipping my wife, I would like to answer the question. You asked about the policy of our Charlotte Police Department and asked me about this general statute.

Q. I am asking if you know or are you familiar with that statute?

A. This was an escaped convict.

The Court: What difference does it make whether he is familiar with the statute or not, what is the statute?

Mr. Bell: I want to know, I will try to show the Court that in obtaining this confession from this boy that the police who investigated this thing intentionally violated the law in trying to obtain or force a confession out of this man, I want to show that they know the law too. Is that the law?

The Court: I sustain the objection whether or not the man knows the statute.

Q. Do you know, I am asking you this Chief, do you know how long the law allows you or——

The Court: Sustain the objection, I don't care whether he knows or not, we are trying to find out if a statement made by this defendant to Lieutenant Coy Sykes was made freely and voluntarily, and you can direct your questions to this witness on that and that is the only thing I am interested in.

(Defendant's Exception #2)

I don't know what kind of food is served in the city jail. They are fed twice a day, they are given a palatable amount. To the best of my knowledge, they get sandwiches. Usually the thing is that a certain amount of money is appropriated by the city which is given to us to run the city jail. We bring a man in there and everybody shares and shares [fol. 27] alike, every person is given something to eat and is given either one or two sandwiches. As long as I am Chief of Police, I would not have any man go hungry in the city jail. I don't know whether this man was hungry or not, I am not a doctor and I have not examined him. I was in command in Italy and I lived on nothing but C rations canned. I was doing all right.

The Court: The Court will take judicial notice that a man can live on a sandwich if he is not doing any work.

By Mr. Bell:

I did not know this man was held in jail three weeks incommunicado. Not to my knowledge, I did not know that there were records in my department which indicate that nobody was to see this man and that he was not to be allowed to communicate with any friends or counsel or use the telephone. This piece of paper shows an arrest number of one of the arrest records. I did not know about the contents of this sheet. It is not a violation of my policy. Not without my knowledge are men put in jail and not allow them to communicate with anybody. In other words I feel like a man is allowed due process of law. I was told that my men did not apprehend this escapee. I was told by Captain McCall, that is right. I can't testify to anything I don't know. Captain McCall told me that he was apprehended by the Chief of Police of Belmont.

Q. And you sent, you asked him to release him to your men so you could investigate this case?

The Court: Will you tell me what bearing that has on whether or not this man made a voluntary statement to Lieutenant Coy Sykes?

Mr. Bell: Well, Your Honor——

The Court: Whether he was apprehended by Santa Claus?

Mr. Bell: Well, Your Honor, this is what we contend, they say they held him in jail seventeen days because he was an escapee.

The Court: I don't care what they said, the only thing [fol. 28] I want to know is was that statement made voluntarily. And you have not brought out a thing yet bearing upon it.

Mr. Bell: We are showing the circumstances that it could not be voluntary.

The Court: I don't know whether you are or not. You have done a lot of hollering but I have not heard much evidence, chasing rabbits all over Mecklenburg County.

Mr. Bell: That is all.

(Defendant's Exception #3)

Cross-examination.

By Mr. Walker:

On the afternoon that I went upstairs to see Captain McCall, it was my understanding that they had had a break in the case, etc., and I went upstairs and talked to Captain McCall around 5 o'clock in the afternoon, and I wanted to talk to the man if he had, I wanted to see if everything was all right, and I saw Captain McCall out in the office and I believe Lieutenant Sykes was there and Mr. Hucks and Mr. Fesperman and several other detectives were around, and I went in the office there where Elmer [fol. 29] Davis was seated, and I told Elmer, I said, "Elmer, I am Chief James, I am Chief of Police of the police department." At that time to the best of my knowledge, Captain McCall and Lieutenant Sykes and Mr. Hucks and Mr. Fesperman were there, I asked Elmer, I said, "Elmer, it is my understanding that Lieutenant Sykes prayed with you, etc., and got this thing off your chest", and he said, "That is right, Chief". I said, "Well, do you feel better about it", and he said, "I feel a lot better about it." I

said, "Well, there is one thing that I want to understand, and that is in this police department I do not want anybody harmed or hurt in any manner in any case no matter how important it is to the public and to the police department, I would like to know if you have been mistreated in any way, or any officers done anything to him that would cause him to think that he made any statement to them against his own free will", and I said that and sat down and at that time I was looking right across to him right across the room, and he said, "Chief, I have been treated all right". And I said, "Well, if there is anything you would like to say to me, I will be glad to hear it", and he said he had nothing to say, at which time I left the room and went on back downstairs.

To my knowledge I don't believe I was there when he signed this statement.

Certain amounts of money are appropriated each year for food in the city jail and this money which we take into the police department we allot a certain amount for food and we do the best we can to get for every man that comes in the police department whatever food is available for the price of money that they give us to furnish it with, and everybody shares and shares alike. If I am given more money I will be glad to furnish hot meals that please the palate of all prisoners. To my knowledge they all share and share alike.

By Mr. Bell:

I don't know anybody who has stayed in the city jail as long as this boy.

[fol. 30] Direct examination.

Detective Fred Hucks testified as follows:

I am a member of the detective division of the city police. I was assigned this case by the Lieutenant in charge of our division, Lieutenant Gillam I believe.

I went to Gastonia and got this boy. Detectives Porter and Homburg got him from Gaston. I do not know when they brought him back to Charlotte, I was not working that particular day. I do not know where they brought him

over here. I was assigned this case on September 20th. I took him to my house because we were investigating another felony with another police department and we were around Canton that particular morning, we left at 5:00 A.M., and there was no place open or there was no food there and I took him to my home on the way to Canton and fed him his breakfast. At that particular moment he told me that he was hungry. The city had no facilities to furnish him any food at 5 o'clock in the morning. I had funds from the City of Charlotte which was furnished me for this reason, for food and other things that might be needed on this trip.

I gave him peanuts at his request. He did not make any statement he was hungry, he said he liked peanuts. I did not sympathize with this man and realize that he was being mistreated and underfed by the City of Charlotte. I did not feel sorry for him. This was not out of my own funds. It was money which was accumulated from funds that were given to us on trips and in this investigation.

I was present when this confession was obtained. I heard Lieutenant Sykes testify yesterday that nobody's name, only one person's name was on this confession when he signed it. I do not know if that is correct. I signed it immediately after the statement was read to Elmer Davis [fol. 31] by Captain McCall, and in my presence and Mr. Gardner's presence and in Mr. Fesperman's presence and Elmer Davis had signed it. At that time the Lieutenant's name was not on it.

I took him out of town because I was investigating other felonies which he stated he had committed out of the county. He voluntarily went. He volunteered to go.

(Witness excused)

Direct examination.

W. O. Holmeberg testified as follows:

By Mr. Bell:

My name is W. O. Holmeberg, I am with the detectives division of the Charlotte Police Department. I brought Elmer Davis from Gaston County to Charlotte along with Lieutenant Gilleland and Mr. Porter from the Belmont

Police Department. Lieutenant Gilleland received a call from Chief Carter over there. I brought him to Charlotte at the Lieutenant's request when he asked us to go over to Belmont police department with him. I only know that they were bringing him over here because he was an escaped convict, and that he had some identification. Had some white people's identification on him. He was an escaped prisoner and he had a box of women's panties. I do not go all over the state to get escapees who are lodged in other jails and bring them to Charlotte. At the time I did not know he was brought to Charlotte for investigation of this case. I don't recall signing the arrest sheet. No, not to my knowledge was I directed by any of my superiors or request the jailer not to allow this man to see anybody or to make any calls. This paper writing is a duplicate of an original. I sure don't spell my name wrong if I filled this out. My name is on here misspelled, I sure don't spell my name wrong. I don't have knowledge of seeing the original arrest sheet. I don't have any knowledge of his being held without the privilege of seeing or calling or communicating with anybody. I have no knowledge of why he was brought to Charlotte other than as an escapee and in regard to [fol. 32] those identifications that he had of white folks. At the particular moment I assisted in bringing him to Charlotte, I did not know that he was being brought over here in reference to this case. Nobody told me. The reason they told me I was bringing him over here was that he was an escaped convict and he had these credentials.

Cross-examination.

By Mr. Walker:

He had a pocketbook that had names of people, pictures. He had a box of panties, a box of ladies panties. I can't recall right now who the social security card belonged to.

(Witness excused)

Direct examination.

Capt. W. A. McCall testified as follows:

By Mr. Bell:

My name is ptain W. A. McCall. I am the captain of the detectives. I did not send officers to Gaston County for Elmer Davis. Lieutenant Gilleland sent them. They went to Gaston County for this prisoner because he had committed a crime in this jurisdiction on or in 1955, to wit: robbery and attempted rape and was serving seventeen to twenty-five years for that offense and he escaped from Haywood County. At the time he was arrested by the Belmont police he had in his possession a box of women's panties, and we were investigating the murder case of the mausoleum in the Elmwood Cemetery and the offense that he committed in 1955 took place just two blocks from where this took place. He was brought over here for the purpose of being an escaped convict and as a likely suspect in the murder case that we had in the mausoleum or in the cemetery. In this murder case.

As a result of his being incarcerated in our jail, Mr. J. D. Wilson, director of consolidated records for the penal system was notified on September 23, that the prisoner was in custody and Mr. Wilson informed me to keep him as long as I wanted to and whenever we were through with him to notify him. I notified him by letter of October 13 [fol. 33] that the subject was indicted in Mecklenburg County Superior Court for murder and rape. We did not want to keep him long. We didn't want to keep him until we got a confession. We did not arrest him over here because he was arrested by the police in Belmont, N. C. I did not issue a warrant for him. There was a warrant issued for him. As a result of the investigation in my department a warrant was signed against him. We did not have to sign a warrant against him before October 6th because he was an escaped convict and was being held for the State of North Carolina. We were not holding him for the State when he was in Gaston County jail, but were making an investigation in reference to our murder case.

Q. Don't you know yourself you are not supposed to hold

a man for an unlimited time without apprising him of why he is being incarcerated?

A. He knew why he was being incarcerated.

The Court: Objection sustained.

(Defendant's Exception #4)

I am the man who dictated that statement, not a confession. I was present when this boy signed it. Not a single person's name was on the statement when it was signed by Elmer. I heard Lieutenant Sykes testify that he did not think Elmer Davis' name was on this when he signed it. I did not hear him say that when he signed it there was only one name on there and that was Mr. Hucks. According to the signatures he signed at the top. He was not the first man to sign it, Elmer Davis was the first. His name was on there when Lieutenant Sykes signed it. That is not a confession, that is a statement of facts as made by him. He did not sign on the first sheet of this statement because if you will read the top of the second page there, it says contained in the first page. The top of the second page is self-explanatory, consisting of two pages.

I was not present when Lieutenant Sykes was talking to him. I do not know what transpired between them. As a [fol. 34] result of the conversation that Lieutenant Sykes had with him, in the office adjoining my office, Lieutenant Sykes came out and got Detectives Hucks and Fesperman and they went to the crime scene and E. J. Davis according to his statement made in my office, and that statement was dictated, re-enacted the crime scene at the Elmwood Cemetery and the Pinewood Cemetery, as a result of the conversation between Mr. Sykes and the defendant.

If my recollection is correct he was brought to our jail on the night of September 21 and this statement was dictated on October 6th. I had talked to him before October 6th about the felonies that he had admitted that he had committed in other jurisdictions and breaking down every alibi that he offered as to his whereabouts on Sunday, September 20. I had talked to him only one time before October 6th and that was on Tuesday morning. At that time he denied having committed any offense. He admitted at the time I talked to him that he was an escaped convict from

Haywood County, and so far as the alleged murder case of Mrs. Foy Cooper it was never mentioned to the defendant until Friday afternoon according to the information in our files and according to what the detectives kept me informed. No that is not Friday afternoon, October 6th, I can't tell the exact date, but October 6th is on Tuesday, and Chief James and myself were in New York, we came back to Charlotte on Thursday night and on Friday afternoon Detective Hucks and Detective Porter and Holmeberg talked to the defendant at which time the murder case was first mentioned to him. He had been in jail two weeks, before any murder was mentioned to him. He knew what he was in there for, he was in there as a result of being an escaped convict and rapist that he had been sent up for and was serving 17 to 25 years. He was convicted of attempted rape and robbery. I have never known him to rape anybody, but he tried like hell to, and the woman is still living. I was not a witness to it. When I brought [fol. 35] him in from Gaston County, I did not know that he had committed this mausoleum murder. We had a strong suspicion that he had committed this murder. We had a strong suspicion as a result of evidence found on the defendant at the time he was arrested, to wit; a box of women's pants. That is a strong suspicion. I can't tell you whether they have been worn or not, they could have been soiled by handling them.

There has never been an order issued in the police department that he was not to see, talk to anybody or communicate with anybody. His own sister came up to see him and talked to me and I let her see him. I don't know if it was after he signed the confession.

I have not seen a photostatic copy of the copy of the order. There might have been one issued for nobody to be allowed to see him because he is an escaped convict. That is a photostat copy of an arrest ticket at the Charlotte Police Department. I do not know where the information contained on this arrest sheet came from. I did not make it out. I do not know who made it out. The original arrest sheet I make out from an envelope usually on the typewriter by or with a pencil or pen by the arresting officer. Then that goes downstairs where his personal effects are kept in that with the original information and this is made

ont on the arrest ticket to put him in jail generally by the desk sergeant. Who put that information on there I don't know. It was not put on there at my direction. But it is pretty good information. I could not say how often this man was interrogated by members of my department before this confession was obtained. I did not direct them to interrogate him periodically. I assigned the entire division to this case. I have 26 or 29 men in my division. I do not know whether all of them talked to him. I talked to him, Mr. Gardner talked to him and Mr. Holmeberg and Mr. Porter talked to him and Lieutenant Sykes talked to him. They talked to him at intervals when he would furnish information. We were interrogating him for the purpose of [fol. 36] breaking down his alibis in reference to felonies that he said he had committed in Haywood County and Buncombe County. I don't mean alibis in reference to this murder case. We did not mention the murder case to him. The murder case was not mentioned to him until Friday before October 6th.

I told this man to sign this paper writing. The statement speaks for itself and in his presence. As a result of telling E. J. to sign the statement after he had had it read to him, he was again informed that he did not have to sign the statement in the presence of the detectives who signed the statement after he had signed the statement and again I warned him that if there was any untruth in the statement to tell me so, we could get it struck out of it. He said, "Mr. McCall, that is the truth, it is exactly how it happened", and he signed the statement and the other officers on the statement signed after him.

The contents of this statement is in my own language and it is so stipulated. The reason I did not put down exactly what he told is because the statement is made for the purpose of use of officers who investigated the crime to testify from, and to enhance the memory or remembrance of the crime that he did at Elmwood Cemetery as he went through it. That is our object in putting down what he said. That is what he told us. It is not in there that he killed a woman in a mausoleum. I certainly did mention mausoleum in there. I mentioned mausoleum to him. What he took the officers down to the mausoleum and showed them. Showed them how he put her there and crawled in

there and how he turned her over. That is why it is in that statement, I have never put words in my prisoner's mouth. Because of the fact that that is what he told us at the time the statement was dictated. And he was warned all the way through the statement not to get anything in the statement that was not true.

When he signed the paper, I would not say that all of these men were in the room with him but I do know that Mr. [fol. 37] Gardner and Mr. Hucks and Fesperman were in the room and there is a possibility that Lieutenant Sykes could have been just outside of my door, you know where the office is located, possibly at the telephone and somebody else come in. Mr. Holmeberg and Gardner were there. Mr. Claude Davis, Jr. was there. And we have the original notes taken down by Mr. Davis in our files as to the wording that is in that statement there.

Yes, we were armed—it is customary that we carry pistols 24 hours a day as long as we are talking. We have colored men on the police force. He was the only colored man in there. The whole police force was investigating this matter. It is the duty of every police officer. They were investigating it. It is the duty of them if any information comes up that we should be investigating it should be turned in to the investigation. These statements were made whenever he reinacted the crime against him at the same time as being true. That statement there was made all at one time.

(Witness excused)

[fol. 38] Chief Jesse James recalled

By Mr. Bell:

I talked to the prisoner after the confession was obtained. To the best of my knowledge, Captain McCall, Lieutenant Sykes, Detective Hucks, Detective Fesperman and maybe Mr. Gardner were present when I talked to him. Yes, we are always armed, 24 hours a day. I was also armed.

I asked him how he had been treated on October 6th. I do not know what date he had been brought to jail. I did not try to find out. I tried to find out how he had been

treated before October 6th, but I have complete confidence in Captain McCall, and knew that he would not let this man be mistreated or any other prisoner that would come under his control. It is a standing procedure for me to find out myself. I think you will find in all police departments when a confession can be obtained due to the many details a chief has when confession is obtained in a case, it is important that the chief come down and asked the prisoner due to the fact that if the man had been mistreated in any way, I would have gone and talked to the solicitor and advised him what had taken place if this man had told me he had been mistreated. I did not make any personal inquiry before this happened. We arrest several thousand people a year and as I told you yesterday, this man was an escaped convict. My only interest in this matter at the time was to see like I am all people that he was not mistreated in any way or other prisoners under my control and I assumed unless he told differently that the man was treated as he should be according to law.

I called him a rapist yesterday for two reasons, one where he attempted to rape, where a man is doing something, a rapist is one who puts his hand on a woman to attempt rape and secondly, this man confessed and made an oral [fol. 39] statement that he took advantage of this woman and murdered her. He told me he did. I believe what he told me. I asked him when he went in to talk if he had been treated all right, etc., and if anything was okay, and he said that it was at that time and at the time he told me that he was responsible for killing this woman or words to that effect. He did not go into any general discussion, he told me that he was responsible. I have a coroner's report that crossed my desk stating what had happened to this woman. And I am not talking before a jury, and I will assume when a man tells me he murdered someone that he raped her at the same time when the coroner says that there was evidence that rape took place, that is what I make my assumption on. The coroner said that apparently the woman had been attacked sexually, molested in some manner, to the best of my remembrance.

The only thing I talked to Captain McCall about, is what I told you yesterday when Captain McCall told me that they

had captured an escaped convict who was a rapist over at Belmont. As an individual I want the truth to be told here no matter how or where the chips may fall.

You may have anything that I have in my office if the Judge directs me to hand it over to you and I will be glad to give you anything that I have if you will tell the Solicitor what I am directed to get.

I was not present when the paper writing was drafted. I have briefly gone over it, but not thoroughly read it. I do not know who wrote it and have not inquired about who wrote it. I don't know anything about the circumstances under which it was signed.

Direct examination.

JAMES W. PORTER testified as follows:

By Mr. Bell:

My name is James W. Porter, I am a member of the detective division of the Charlotte Police Department and has been approximately six years. I have been in the depart- [fol. 40] ment about eleven years. I went along with Lieutenant Gilleland and Mr. Holmeberg to Belmont to get this prisoner. We brought him here to investigate felonies due to the type of papers that he had in his possession when he was arrested, and he was an escaped convict. He had several pairs of ladies panties in his pocket. We kind of had a suspicion that he might be involved in the crime due to the pictures of white ladies that he had in his pocket, due to the time that he was arrested, he had one pair of soiled ladies panties in his pocket. He had several pair in a shoe box, and as Captain McCall brought out, he was serving time for attempted rape.

I don't remember whether we told him or not to be honest with you why we were bringing him back. I don't remember whether I signed the arrest sheet or not or whether I wrote it or not. I did not instruct anyone not to allow this man to talk to anybody or to communicate with anybody or to contact any of his relatives. I don't know who did. I was in his presence when the arrest sheet was signed. I don't remember who did the writing. Sometimes I write them and sometimes Mr. Holmeberg or whoever is

there appears on the record. We have no certain one to write them. One member of my party did the writing. Lieutenant Gilleland, Mike Holmeberg and myself were in the party. One of the three did the writing, I believe we could narrow it down and say either Holmeberg or I did, one of the two of us did. I did not hear Mr. Holmeberg testify that he did not do it, I believe he said he did not remember. One of the two of us did: I said I don't remember, I might have, I don't remember. I did not make that statement on there. I don't know whether that statement is contained on the arrest sheet. I don't recall who wrote it. I probably saw it, we write so many that it is hard to pick out one and remember them word for word. I remember that we don't give out any orders like that. I do not know how long this man was in jail before he confessed. I was not present.

I talked with him on three occasions in reference to this crime. The first time we talked with him was a Friday [fol. 41] after he was brought back to Charlotte, I don't recall the date. We did not talk to him in reference to this crime. We talked to him in reference to the ladies panties that he was carrying with him. We talked to him in reference to this crime one time. That was the following day, on Saturday, I don't remember the date. He denied it. If we go through the whole interrogation, I would like to have all the ladies leave the court room because it gets a little dirty. We did not mention it to him but one time and that was on Saturday. That is the only time that I was ever around him. Mr. Holmeberg and I interrogated him on three occasions, twice Saturday—Friday and once Saturday. We did not talk to him about the murder at all until Saturday afternoon, at which time he denied it.

Cross-examination.

By Mr. Walker:

I don't recall the date he denied it. The Saturday before the Tuesday he confessed.

(Witness excused)

HOMER C. GARDNER testified as follows:

Direct examination.

By Mr. Bell:

I am a member of the detective division of the Charlotte Police Department. I was not particularly signed to investigate this mausoleum murder of Mrs. Cooper. I talked to the defendant. I would say twice. I am not positive about the dates. Sometime subsequent to the statement he made to Captain McCall. Sometime afterward and sometime before. I never mentioned to him that he had killed this lady. I talked to him about the goods that he had in his possession when he was arrested at Belmont.

(Witness excused)

Lt. C. M. SYKES who had been previously sworn was recalled:

By Mr. Bell:

I was present when Captain McCall told the defendant to sign the confession. There was possibly five people in the room to my knowledge. I signed the top sheet of this [fol. 42] paper. I did not talk prior to October 6th. I did not tell him that he could go ahead and confess to this crime, that somebody had to account for it. I did not tell him to make any confession. I did not send for him.

(Witness excused)

Captain W. A. MCCALL previously sworn testified:

By Mr. Bell:

I am Captain McCall of the detective division of the Charlotte Police Department. I believe this paper writing is marked Defendant Exhibit 2. Yes Sir, that is a statement of Elmer Davis concerning the murder of Mrs. Foy Bell Cooper on September 29, 1959, written on City of Charlotte inter-office communications. Yes sir, this is the original written copy. We have the original notes taken

by my secretary, Detective Claude E. Davis. This is the original typewritten copy.

Capt. JOHN W. YANDELL testified as follows:

By Mr. Bell:

I am Captain Yandell of the Charlotte Police Department. I am custodian of the record bureau. I have in my possession the original typed arrest sheet on Elmer Davis, Jr. This copy was made by H. L. Robinson, desk sergeant. This is the original arrest sheet as far as we know. Our system is that when a man is arrested if he has any personal property or valuables or any objects that he could hurt himself or anyone else with, it is taken off of him and put in a brown envelope, and the brown envelope contains the same information that is on the arrest ticket. That brown envelope is brought down and the desk sergeant types from the brown envelope the same information on a permanent white arrest ticket.

The information that I have contained in that arrest sheet came off of a brown envelope such as this. No that is not the envelope. Our system is if there is no, if the prisoner has property, when he is sent to the county jail, the brown envelope is sent with him to the county jail. If there is nothing of any value then the brown envelope is destroyed. As far as I know this is an accurate and [fol. 43] true original typed copy of the arrest sheet. It has not personally been in my custody or care since it was made out. It has been in the records bureau but not under my personal supervision. I got it this morning from the files of the records bureau on a subpoena duces tecum. That is supposed to be the policy that nobody is allowed in those files but officers of the records department, but we will say that nobody is allowed in the files except employees of the police department. That file there has been in such department since it was made.

(Whereupon the document referred to was offered in evidence as Defendant's Exception #3)

(See page 42 (a))

The contents of that paper writing was gotten off some envelope. The arresting officer made out these envelopes. I do not have that envelope with me. It is signed by the arresting officer in their handwriting. One of their handwritings. The arresting officers in this matter were Lieutenant Gilleland, W. A. Holmeberg and J. W. Porter. And one of the three of them furnished the department with the contents of this paper writing.

Cross-examination.

By Mr. Walker:

Mr. Robinson types this up. It has his initials in the left hand corner. I do not know anything personal about that particular arrest sheet. I did not make it up myself. I don't think I was present when it was made up. This "phw" means preliminary hearing waived. This white sheet was not drawn up by Mr. Robinson after he had waived preliminary hearing. The disposition or preliminary hearing waived was written by one of the girls who do that taking it from the court docket upstairs. Her initials are not on the card. I could tell by the handwriting who put preliminary hearing waived on it, but that is the only way. It was Mrs. Cadell. She got that information from the records of the Court. But I don't know what was on the brown envelope from which Mr. Robinson typed this information. So I could not say that what is on this white sheet is accurate.

Redirect examination.

By Mr. Bell:

[fol. 44] If I am not mistaken this sheet was made up at the time of the arrest of 11:00 p.m., on September 21, 1959. I would venture to say it was made up within an hour after he was brought in. I could not say, the desk sergeant may have been a few behind and it may have taken him that long to catch up and get to this. I don't know, but it was made out on the day that he was put in. The prisoner was brought up and placed in jail. The part that was written in was added after the preliminary hearing or after the

hearing which was in the City Recorder's Court. That is made out in three copies, a white copy, a yellow one and pink one. I would guess that the jailer is suppose to do what in reference to the particular prisoner is described therein. I don't know of any definite orders that he has to live up to. A copy of that is put in the jail for him, and he is suppose to govern himself accordingly.

(Witness excused)

The Court: Any further evidence for the defendant?

Mr. Bell: Your Honor, that is all the defendant has . . .

The Court: Any further evidence for the State on this point?

Mr. Walker: No.

The Court: Let the record show that the Court at this time rules that the statement made by the defendant to Lieutenant C. L. Sykes in the City of Charlotte police department, was made voluntarily and such statement is admitted in evidence as shown by the written record. To the ruling of the Court, the defendant objects to the purported conversation in answer to the questions previously asked the witness, C. M. Sykes, and as shown by the record. The defendant in apt time objects and excepts.

Lieutenant Sykes come around to the stand and the jury will be brought in.

Whereupon, the jury returned to the panel.

(Defendant's Exception #5)

(Inquiry as to voluntariness of statement of defendant ends)

[fol. 45] Direct Examination Resumed.

Lieutenant Sykes:

By Mr. Walker:

When Davis and I started talking at the beginning, Mr. Hucks and Mr. Fesperman were present. I asked Elmer Davis if he would like to talk with one of us by ourselves, either of the three, it made no difference. He said he would like to talk with me. Mr. Hucks and Mr. Fesperman got

up and left the room. I asked Elmer what he had to say. He said, "I just want to let you know that I want to get some things off my mind and get some things clear." I said, "All right, Elmer, if that is what you want, that is what I am here for is to listen." Before he said that, Elmer had a small Testament in his mind, A New Testament, I don't know whether it was a New Testament, it was a small portion of the Bible scripture in his hand, it was not a complete Bible. I asked him since he had been in jail if he had done any praying to the Almighty, and he said he had not, he said that he did not know how. He asked me if I could pray for him that he felt that he needed it. [fol. 46] I told him that I would be happy to do so, and I did. After I finished—It was not loud but it was not silent. It was loud enough for him to hear. When I finished, I asked him if he had anything that he wanted to say to me. He said "Yes Sir, I do." He said, "I feel better", he said, "I killed the woman." I said, "All right, do you want to tell me what happened", he said, "Yes sir, I want to, I went to the cemetery and she was sitting on a bench, and I went over a fence and grabbed her from the rear and drug her behind a tombstone where I threw her down, and laid down and I had relations with her." I asked him in what way, and he said, "by mouth". He then told me that he picked her up and carried her through a fence that had a hole in it.

He said he came in contact with the vagina by mouth. Prior to that the only statement I recall that he said he grabbed her from the rear and drug her beyond this tombstone, of course at that time I was not familiar with any tombstone or any part of the cemetery. He then picked her body up, he said her head struck some part of the tombstone when he put, placed her on the ground. After picking her up, her body up and carrying her in his arms, he went through the fence that had a hole in it, across a portion of the cemetery down to what he called the little house, and placed her body inside of that. At that time I asked him if he would be willing to go with Detective Hucks and Fesperman and myself to the cemetery and show us just where he had entered, where she was sitting and the tombstone that he had her behind, and the little house that he was referring to, and he said he would. And at that time

I called Mr. Hucks and Mr. Fesperman back into the office and told them what Davis had related to me, and told them that he was willing to accompany us to the cemetery and show us as far as he could what happened in the cemetery. We then proceeded to the cemetery with Davis. We entered into the cemetery on the 6th Street entrance, and went up about to the entrance where 7th Street comes into the cemetery, and that is also the location of the office. We stopped there and asked him in what direction it was from [fol. 47] there, he pointed on further and said it was over that way. We drove around in a small road in the cemetery on over to a point that a wire fence was a dividing line there. We parked near that fence and got out, and asked him to lead us or show us which way he came in. He said he came in from the 9th Street entrance of the cemetery, and that he then taken us on up to the cement seat that the lady was sitting on. He said that he came up, said she was sitting there with a newspaper and showed us the direction that she was sitting, he said, "I came up a little road that is on the opposite side of the fence", I believe that is known as the Pinewood section of the cemetery. He showed us in which direction—She was facing in the direction of the Nivens Tombstone. He told us that he came to the opposite side of the fence from the side that she was sitting on, and walked below her which would have been to her back, and that he crossed the fence from the opposite side of her, and showed us where he came over the fence, there is some possibly two or three trees there, that he used to help himself get over the fence, and that he came up behind her, and grabbed her from the rear. He then taken us from this seat to the rear of a large tombstone that was possibly to the best of my recollection 25 to 30 feet away, and that he threw her body to the ground, and that her head as he recalled it, her head hit the bottom portion of the back part of the tombstone. He then got on the ground himself and in a position as he showed us as to how he got on it, her head was away, he told us her head was laying in I believe the eastern direction, her feet would have been in the western direction, and when he got down on his hands and knees, his head was in the westernly direction and the rear was in the eastern direction, he got in the opposite direction that he said the body was lying. After

he had finished what he called a relation with her by mouth—He described to us an unnatural sex act with this woman. Of course he stated, he used the term and he stated the way he used it. He said he then picked the body up, and he carried us to a large hole that is in the fence, the fence is possible five or six feet high, I did not measure [fol. 48] it, I am only guessing at the height of it, but the hole is large enough to go through, a person as tall as I could have to stoop to go in because the top of it as I recall had a strand of barbed wire.

I am about six feet two. He then showed us after going through the hole in the fence, he then taken us over a slight hill and down in to the bottom of the hill or towards the bottom of the hill and this would have been, the actual distance from the fence I don't know, I would say possibly 150 to 200 yards, that is only a guess, to a small house over the hill that he described as a house. He showed us the door into this mausoleum. The door to the best of my knowledge was sitting in the center of the mausoleum, that was a wooden door with light panels in it. It was a solid door too but it had sections in it, panels. To the best of my recollection, he said he had entered into a hole that was in the door of the right side of the lower part, and that he carried her body in there and placed it in one corner of the mausoleum. We did not go into the mausoleum and I have not been in the mausoleum so exactly where the body was placed I could not say.

To the best of my recollection, he said that he choked her, and I believe he was asked if it was with a rope, and he said he did not use a rope, that there was not a rope involved. I don't recall where and when he choked her. Mr. Hucks and Mr. Fesperman, both detectives, and myself were at the cemetery.

After we took him down to this mausoleum, he told us that he believed that when he left her in the mausoleum, he believed she was still living, that he did not think that she was dead at that time. He told us that when he left her there that she was bleeding, that there was blood on her face.

He said when he left the mausoleum, he came back up across a portion of the cemetery, he taken us right near a bunch of shrubbery just not too far inside of the 9th Street entrance of the cemetery, and showed us where he placed

her glasses and pocketbook in a piece of shrubbery. This shrubbery I would say is possibly better than 200 yards [fol. 49] from the mausoleum. I don't know just exactly, I did not measure it but it is a good ways. It would be possibly about the length of this court room from the Nivens tombstone. In feet I would say the Nivens tombstone from this group of shrubbery I would say is possibly 150 to 200 feet. That is where he told me he put her glasses. He did not take us any other place in the cemetery. I believe he said that he looked in the pocketbook and there was only a small amount of change, and whether he said he taken that change out or not I am not sure. We brought him back to the police car, and got in the police car and returned back to my department.

This is a paper writing, marked State's Exhibit No. 10, of a statement concerning the murder of Mrs. Foy Bell Cooper. Captain McCall talked to Elmer Davis in his office in the presence of Detectives Hucks, Fesperman, Gardner and myself, and talked with him in reference to the murder of Mrs. Cooper, asked him if he committed the murder, he stated that he did, and Captain McCall asked him if he would be willing for a statement to be made to that effect, and he said yes, he was guilty and he was willing for a statement to be made. Mr. Davis, the secretary, was called in. Captain McCall went over the entire thing with him, with Davis, and asked him if he could dictate the statement for him, and he said he could. Captain McCall dictated this statement in the presence of Davis and the detectives that I mentioned, dictated it to Mr. Davis who taken it in shorthand and then later typed this statement from his shorthand notes. The statement was given to Captain McCall and he read the entirety of it to Elmer Davis, and asked him at the end if there was anything in this statement that was not true, he wanted him to say so that the correction would be made as to what he termed as being the truth. Elmer said as far as he knew that everything in that statement was true. I do not recall when Davis signed the statement, whether it was before my signing it or afterward. I frankly do not recall him placing his name on there whatsoever. [fol. 50] I heard Captain McCall dictate the original statement to Mr. Davis. He made no denial of what Captain McCall was dictating. He asked him, I don't

know how many times, there was times that he stopped during the dictation and would ask Davis is this correct up to this point, and he said it was. Each time that he was asked during the statement if there was anything incorrect, or if there was anything there that had been placed in there that was not true, to let it be known, and he said there was not. The same thing was asked him at each, the end of the statement if it was true. I was present when it was read to him. At no time did the defendant say that any portion of it was untrue. He said that what was in this statement as had been read to him was true.

Mr. Walker: I want the jury either to read it themselves or for someone to read it aloud. It will be quicker to read it aloud. First of all I would like to make a motion that this statement be introduced as State Exhibit No. 10.

Mr. Bell: Object.

The Court: Overruled. The statement being in evidence, Mr. Solicitor you may read it.

(Defendant's Exception #6)

Mr. Walker: (reading) I was arrested on Monday, September 21st by the Belmont, N. C., Police Department where I was fixing to go to my aunts house. I am now going to give you a statement relative to the woman being strangled and choked to death in Elmwood Cemetery on Sunday afternoon, September 20th. I have not been promised any reward or hope of reward. I have not been mistreated by any of the detectives or any other person who has talked with me. I have been told that I do not have to make a statement and if I do make a statement or answer any questions pertaining to this murder, it can be used against me or for me in a court of law.

"I have talked with several detectives in the last few days about this woman who was choked to death and raped [fol. 51] in the cemetery on September 20th, Sunday afternoon. Today, October 6, 1959, I was talking with Lt. Sykes and Dets. Hucks and Fesperman and in discussing it, I told them that I would go with them to the cemetery and show them exactly how I grabbed the woman, where I placed her behind the large tombstone, how I grabbed the woman, where I placed her behind the large tombstone, how I grabbed her, how I threw her down and how her

head hit the corner of the tombstone, how *how* I choked her with my bare hands and how I tore her pants off, how I sucked her pussy, how I carried her over the wire fence between the white and the colored cemetery, as nearly as possible the same route that I carried her to the mausoleum in the colored cemetery, how I pushed her thru the small hole in the right hand door, and since the hole has been nailed up, I explained how I pushed her thru, crawled in over her and place her face down on the floor, her head being up in the left hand corner as you enter and her feet to the left hand side of the mausoleum or house. I showed them where I put her pocketbook (belonging to the woman) and her glasses in the hedge. When we returned to the office, we had another talk and I was told that it was necessary for me to show them where I put my prison shoes and clothes that I was wearing when I choked this woman to death in the cemetery. We went back to the Southern Railroad tracks at the 7th St. entrance to the cemetery, where I showed them my shoes that I was wearing when I committed the crime. The place that I left my shoes, there was a white man drunk, I suppose, and passed out. I took his shoes off and put them on my feet, and also took his socks off and put them on. I took his billfold which had no money, but had a social security card, some pictures and other papers. All of this I had on me when I was arrested by the Belmont officers the following night. I then took the detectives to where I threw away the shirt and pants that I was wearing when I choked the woman in the cemetery. I told the detectives that the pants that I was wearing, I took off a clothesline in the back yard somewhere off the P & N tracks on the west side of Charlotte. I then [fol. 52] took them to where I had thrown the pants and shirt down an embankment off the P & N Railroad, that I was wearing when I choked this woman to death in the cemetery.

I know one thing, that when I grabbed the woman sitting on the bench with a newspaper under her, I choked her and dragged her to where I dropped her behind a big tombstone where, as I told you, I tore her pants on the side and choked her, using a lot of pressure. I am sure that in the struggle when I threw her down, back of the tombstone, that her head hit the corner of the tombstone, because she

was bleeding some from the head. The handkerchief that I had in my pocket when I was arrested was one I used to wipe my mouth in the cemetery after I finished sucking her pussy. Another thing I remember is that when I grabbed her, a little dog was sitting on the ground beside the bench. I did not pay any attention to the dog, and do not know what happened to it.

Subject: Page Two of Statement of Elmer Davis, Jr., concerning murder of Mrs. Bell Dixon Cooper on September 20, 1959:

"In closing, I want to say this. I have known in my own mind that you people were holding me for, and all the time I have been lying in jail, it has been worrying me, and I knew that sooner or later, I would have to tell you about it.

"I have made this statement freely and voluntarily. Captain McCall has dictated this statement in the present of Detectives W. F. Hucks, E. R. Fesperman, H. C. Gardner, C. E. Davis and Detective Lieutenant C. L. Sykes. I am glad that it is over, because I have been going through a big strain."

/s/ Elmer Davis, Jr.

/s/ Coy L. Sykes, Detective Lieutenant. /s/ W. F. Hucks, Detective. /s/ E. F. Fesperman, Detective. /s/ Homer O. Gardner, Detective. /s/ Claude E. Davis, Jr., Detective.

[fol. 53] Lt. Sykes continues

Yes, that is my signature which appears on page 2 of State Exhibit No. 10. After we came back to the police station in the detective bureau, Captain McCall asked Davis what he did with the clothing that he was wearing at the time that he committed this murder. Davis told him that he threw the clothing on the embankment on the P & N Railroad tracks leading in the direction of Gastonia. That is possibly between two and three miles from the entrance of Elmwood Cemetery. We then taken Davis to the police car, Detective Hucks, Fesperman, Gardner and myself, taken him in one police car under his direction, we went out West Morehead, he told us to turn to the right, I believe that is Summitt Avenue. We proceeded to where the P & N

Railroad tracks cross this street. He told us to stop the car and we would have to walk up the P & N tracks. We walked back in the direction of town or back in an eastern direction and he told us that that is where he threw the clothes.

He carried us to a part of the P & N tracks near a creek and stated that he threw the clothes in that vicinity down the embankment. After all of us made a search of the weeds etc., and the shrubbery on the bank, the clothing were found that he identified as being his. State Exhibit No. 18 is a pair of trousers before. I saw them on the P & N Railroad tracks in the western part of the city. The defendant said they were his pants, that he was wearing at the time he was in the cemetery and killed the woman. State Exhibit 19 is the shirt that was found with the trousers and at the time Davis said that it was his shirt he was wearing at the time he committed the murder in the cemetery.

After we left this location, we came back to the police car and Davis asked us if we would like to go and pick up the shoes that he was wearing at the time, and we told him [fol. 54] we would. He directed us to 7th Street entrance of the cemetery. We parked the car at the end of 7th near the railroad tracks. That is Elmwood Cemetery. We got out of the car and walked to the Southern Railway tracks and to the left bank in the direction of town approximately 30 to 40 feet from the 7th Street crossing, and he went over into, I believe, well, there was shrubbery or honey suckle vines I believe, and picked up the shoes and handed them to one of the detectives. I was present at that time. Yes Sir, these are the shoes that Davis got out of the bushes off the railroad track at the entrance of East, or West 7th Street. This would be approximately to the entrance of Elmwood Cemetery, possibly 75 feet. He said that those were his prison shoes. Detective Hucks was with me on each of these trips.

Yes, I said a prayer for the defendant. I go to the Central Avenue Methodist Church. I am an officer in the church. I am on the Board of Stewards.

Q. Do you have any other position in the church?

Mr. Bell: Object to all of this and move to strike.

The Court: Overruled, exception.

A. I have been appointed by the District Superintendent as a Methodist Lay speaker.

By Mr. Walker:

Q. What does that mean? For some who might be Baptists?

Mr. Bell: Object.

The Court: Overruled.

A. That only means that I go as a speaker for the Methodist Church throughout this district, Methodist Conference, to speak on Sunday in churches that do not have a regular pastor.

(Defendant's Exception #7)

Cross-examination:

Yes, I first saw him on the 6th of October. I knew he had been interrogated. I knew that he had denied it. No, I did not know that he had denied it on numerous occasions. I knew about it one time. At that time I did not know that [fol. 55] he had been incarcerated since the 21st of September. I found out about that possibly some time after the 6th of October or possibly it could have been sometime during that day. I saw on him the 6th of October, and he was being brought into the detective division by Mr. Hucks and Mr. Fesperman. I don't know about further interrogation. They brought him in there that time for interrogation. I came in the room where they were. No, I did not ask to talk to him alone. I did talk to him alone. No, I did not say that in a few minutes I was able to get a confession out of him. He made his confession to me. Yes, in a few minutes. No Sir, I did not tell him that if he did not confess I was going to beat hell out of him. Yes, I heard him tell the Court that I told him that if he did not confess I was going to beat the hell out of him. He confessed to me after a few minutes, yes. I don't imagine I was with him more than between five and ten minutes. I did not use any threats. I was there when this confession was drafted. That is true, I signed the confession. I did not read the contents of the

confession. The contents were read in my presence. That is correct, I signed the top line. I told you I did not remember when the defendant signed it. I sure did, I said I don't recall whether he signed it or not. I signed it due to the fact that the statement was read to him and he said that the statement was correct. No, that is no confession, that is a statement. It is a signed statement. No, I did not sign it to the effect that he had signed it because I said I do not know when he signed it. I don't recall seeing a place down there for him to sign, no. I think possibly one name was on it when I signed it. I don't recall what name was on it but to the best of my recollection there was one name on there when I signed. I do see his name on this exhibit. No, not his signature, no. On this exhibit I see his signature of Elmer Davis, Jr. On this page I do not see anything that says he killed anybody. I do not see anything on this page that he signed. I did not get his signature on any page. I did not ask him to sign it. I [fol. 56] heard Captain McCall testify that he told him to sign it. No Sir, I don't intend to tell the jury that I did it in ten minutes.

I did not go out there when this murder was reported to the detective division. I did not ever see the body. Yes, he told me these were the clothes he was wearing when he committed the murder. I have examined the clothes. No, I don't find any blood on them. I did not find any blood on the pants. Not to my knowledge were they sent off to be analyzed. Well, to start with I don't think that was my job to have them sent off and I certainly was not instructed to send them off. Possibly could have sent them off to a laboratory, yes. I do not know what they could have found. Oh yes, I have sent clothes off to be analyzed and examined. I was not instructed to do it in this case. No, I was not only interested in pinning the murder on this man. I looked the clothes over, I don't know as I particularly looked for blood. I did not go out to the mausoleum and have the door fingerprinted. I was not on duty at the time that the murder happened. I was not even in town when the murder was committed. Yes, I was here when he confessed, that is right. This was possibly some three weeks afterward. There would have been no reason to send out there and get fingerprints. No, the reason I did not is because I knew

I would not find this boy's fingerprints. The only evidence is what he told me and what he showed us at the cemetery. He showed me some things I did not know before. No, I did not know about the pocketbook. No Sir, I don't think I knew that the police department had the pocketbook before he went out to the cemetery. I know it now. He told me there was some money. Not until he told me did I know. I do not know how much money was in it. No, I don't know as I have told the jury that this man was out there stealing shoes off of people's feet and taking pocketbooks away from a woman and did not even take the money out of it. No, I don't know that there was some money in it when the police got it. No, I did not tell this man that I had already solved the crime. I did not tell him that I was [fol. 57] going to fram the hell out of him if he did not sign this paper.

It could have been an unsolved murder, yes. I don't think I meant to get that confession if I had to keep this man in the city jail forever, no. I don't believe that if he had not confessed to this crime he would have been over there right now incommunicado, no. I don't know if I would have finally made the decision to let him go to prison where he belonged.

I have been a detective possibly since 1941 or 1942. I have been on the police department some twenty odd years, that is right.

Q. Don't you know that a man who has been put in jail is supposed to be apprised of what charge is against him in twelve hours, don't you know that the statute requires that?

Mr. Walker: Object to that question on the law.
The Court: Sustained.

DEFENDANT'S EXCEPTION #8

I was there when this paper writing was drafted. Yes, I heard him use the word mausoleum. I believe the man stated that, when he talked with me that he used the term old house. No Sir, the boy did not tell me that he could not read. I do not know that he can't read. I knew that he had a Bible or portion of the Scriptures that he was read-

ing. I think that Captain McCall told you that this paper writing is written in his language, yes. I was not directing the investigation at that time, Mr. Bell. Yes, I take orders from my captain, I don't give him orders. No, I did not hear anybody explain to him what any words meant, no. No, I did not hear anybody identify any word to him.

Redirect examination.

By Mr. Walker:

No Sir, the defendant did not ask anybody to explain any of these words to him. Yes, there was one signature on this second sheet when I signed it. I do not recall whose [fol. 58] it was. Yes, it could have been anybody whose name appears there. That is right, it could have been the Defendant's. I was at Virginia Beach, Virginia when this murder was committed. Beginning with the 20th of September, 1959, I was out of the city, Mr. Walker, I don't remember just when I came back. I came back between the 20th and the 27th or 28th of the month, of September. I returned to work on the 5th of October, on Monday. I had no connection whatsoever with this case before October 5th. In fact I did not have any on October 5th. I first learned about this investigation on the morning of the 6th of October, is the first time that I had the opportunity to go into it with any of the detectives. That is the same day that I talked to the defendant. I did not offer to use any force or violence or any kind whatsoever on the defendant when he was in my office.

Recross-examination.

By Mr. Bell:

I was in here during some of Dr. Summerville's testimony, not all. I think I heard him say that there was blood on her face. I don't recall hearing him say and certain other portions of the body, no. The man told me that he took her in his arms and carried her to a certain area of the graveyard. I am not familiar with the cuts and abrasions that were described by Dr. Summerville, no. I heard him tell the Court about some abrasions or cuts. I believe

he used the terms cuts, abrasions or scratches. I did not hear him describe about the blood on the body.

(Witness excused)

W. Fred Hucks testified as follows:

Direct examination.

By Mr. Walker:

My name is W. F. Hucks. I am a detective in the Charlotte Police Department. I have been with it thirteen years the first of this past November. I was assigned as one of the detectives to conduct the investigation concerning the slaying of Mrs. Foy Bell Cooper. I was first notified of her [fol. 59] death on September 20, 1959. I went out to the cemetery on that day. On October 6, 1959 I talked to the defendant, Elmer Davis, Jr. I talked to him in the detective division of the police department on the second floor. On October 6th around 12:30 approximately, Detective Fesperman and myself decided to talk to Elmer Davis, at that time we went back to the jail and brought him out. I don't remember whether I got him or whether Mr. Fesperman got him. I had talked to the defendant prior to that occasion. The conversation about the murder of Mrs. Foy Bell Cooper was brought up for the first time with the defendant on Friday before the 6th of October. On that particular date I did not talk with him in regard to the murder. I requested that Detective Porter and Detective Holmeberg talk to him in regard to this matter but I did not personally talk to him. I first talked with him in connection with Mrs. Foy Bell Cooper on Monday, on October 5th. Just regular routine questions as to the murder, and what he knew about the murder, where he was on that particular day. He stated that he was in Belmont on the day of the murder. No Sir, he did not tell me whether he was in Charlotte at any time on that day. I told him that day was September 20th. Yes, the day of the murder, September 20th, we questioned him in regard to this murder, he denied it at this time, and if I may go back to September 22nd and come from there if you like. Yes, he denied it on October 5th, the first time I talked to him about this murder. I talked to him the next time about this murder on the 6th of October. I talked with

him then in the detective division along with Lieutenant Sykes, and E. L. Fesperman. The conversation was in regard to the woman killed in the cemetery, just routine questions in the murder investigation.

In my presence we asked him if he had anything to do with the murder at that time, and asked again if he was in the cemetery. He was very reluctant and would not speak any at that time, and we asked him several questions in regard to clothing that he had on, and where his prison clothes [fol. 60] were, where he had discarded them, and he stated that he had discarded his prison clothes in the mountains when he escaped, and this was only approximately ten minutes, and Lieutenant Sykes was asking, that was prior to Lieutenant Sykes entering, he was asked to come in and we asked him several other questions pertaining to the murder as to where he had been on that particular day, and at that time Lieutenant Sykes asked Elmer if he would like to speak with either one of us alone because he had dropped his head and would not answer any questions. Lientenant Sykes asked Elmer if he would like to talk to either one of us alone in regard to the woman being killed, in the cemetery, and at that time, Elmer stated that he would like to talk to *talk to* Lieutenant Sykes, and Fesperman and myself left the room. Lieutenant Sykes was in the room approximately five minutes, maybe a little longer, I don't recall exactly the time.

Yes Sir. There was a social security card and other personal effects found on Elmer when he was arrested, there was pictures. I asked him where he had got those social security cards and two sets of pictures, he stated that when he escaped from prison—On his way to Charlotte that he had obtained a book from a railroad bum with his social security cards and pictures in them. The name Bishal Buren Hayes was on one of the social security cards. He stated, first stated that he had obtained that one from a house that he had obtained merchandise from between Canton and Asheville, and also the clothing that he was wearing. Yes, that is the social security card I am referring to. I have seen these pictures, yes sir. These were on the personal belongings of Elmer Davis in his personal belongings when he was arrested in Belmont. He stated that he had obtained these with some of the merchandise that he had

taken or had taken or had taken the merchandise that he had taken or someone had given him after he escaped. These particular ones I believe were some man gave them to him in Hickory, North Carolina.

[fol. 61] This envelope contains pictures, blood donation cards. That blood donation card is Bishal Buren Hayes'. The name on the blood credit card is Bishal Buren Hayes. The name on the calendar and other blood donor's card is Bishal Hayes. I questioned the defendant with respect to those items in the envelope. He said he secured them from some railroad bum in Hickory that was riding a train. Yes, on his way from Asheville.

When I came out of the room at the time that Lieutenant Sykes talked with the defendant in private, Bishal Buren Hayes, whom we had been looking for for some two or three weeks since first the murder had occurred, we had telephoned the chief of police in Spartanburg where his home was to find where he live. We had been looking for Hayes at this time, to question him in this matter, we had called the police department and tried to get in touch with Hayes through them. At the time we came out of the room, Hayes walked into the police department and these credentials were shown him. Bishal Hayes did not make any statement in the presence of the defendant, Elmer Davis. At that time, we, Lieutenant Sykes came out of the room with Davis, and asked Fesperman and myself to go with him to the cemetery with Elmer, he wanted to show us what he did. At that particular time we proceeded to the cemetery.

We went into Elmwood Cemetery at the 6th Street entrance, we proceed around to the office which is at the 7th Street entrance of Elmwood Cemetery. At that time I don't remember whether Fesperman or myself was driving, I am not sure. Then we asked Davis which way should we go from there, and he directed us on to, in a northern direction in the cemetery and when we got to the road which leads next to a fence which adjoins the colored cemetery or Pinewood Cemetery from the Elmwood Cemetery, he said "Stop here." And that was in the vicinity of the Dixon grave, the mother of Mrs. Cooper. That is approximately 43 feet and 7 inches from the Nivens tombstone. I measured it. There is a fence behind the Nivens tombstone, yes. That fence is five foot and six inches. Yes, that was measured.

[fol. 62] There is a fence that separates the two cemeteries, the Pinewood and the Elmwood Cemetery, there is a bench next to Mrs. Dixon's grave, the mother of Mrs. Cooper. It is a tombstone approximately three and a half feet high and approximately six and a half to seven feet in width. We asked Davis to show us exactly what he did.

Davis proceeded to the bench which is next to the Cooper grave and pointed to the fence there where there is approximately two or three trees, where he stated that he had come over the fence at the back of where Mrs. Cooper was sitting, to the back of Mrs. Cooper who was sitting on the bench at this time. Yes, we measured the distance from that point to the bench. The distance across from the fence to the center of the bench where Mrs. Cooper was sitting was 20 feet, 7 inches. Yes, that is from what he told me. The defendant then after he crossed the fence, he slipped—come to the back of Mrs. Cooper, ~~he~~ then, he said, mugged her, put his arm around her and choked her and then dragged her to behind the Nivens tombstone and there he threw her down and as she went down, he had choked her and he said at that time that she, he had thrown her down very hard, that her head hit the back corner of the Nivens tombstone. From the bench to the back of the Nivens tombstone is 43 feet and 7 inches. Yes, that was measured.

He stated at that time when he threw her down, that he had relations with her by mouth through the vagina, and at that time he ejaculated himself. At the time when he reached, was reaching a climax after masterbating, that he managed an injection into Mrs. Dixon's body, his penis. At that time, he stated, he went back to the bench where Mrs. Dixon was sitting, where her pocketbook was and her glasses laying on the ground where when he grabbed her, which had fallen off, and a newspaper which she was sitting on, he stated that he wrapped the pocketbook up in it and glasses up in the paper and laid the glasses there on top and then he goes back behind the Nivens tombstone. I [fol. 63] would like to go back a little further there.

He stated that along about that time that someone came up through the cemetery and that he had crouched in the weeds next to the fence which adjoins the Pinewood and Elmwood Cemeteries together. He showed me where this

point was. That was eight feet from the bench where Mrs. Cooper had been sitting before this happened. He stated that then he went up behind the tombstone back to the tombstone from where he had dragged her behind there, he laid the pocketbook on her. That she was face up and he laid the pocketbook on her and then picked her up and then continued on down to the gate just below the Nivens tombstone, there is a hole in the fence in which he crossed over. The distance from the center of the Nivens tombstone to the point where the defendant told me he crossed the fence is 47 feet 6 inches. Davis stated that then he crossed the fence with Mrs. Cooper in his arm or with the body in his arms and then he proceeded down the hill to the little house which he called a little house. He showed me the mausoleum which is at the foot of the hill. That is the Jones Mausoleum and then crammed or pushed Mrs. Cooper's body into the mausoleum, and then at that time he went in himself and drug the body on the inside and then put it on to the left of the mausoleum so it would not be noticed as good as it would have been laying where the entrance was gained. Then he stated that he came from the mausoleum and proceeded, picked up the pocketbook and proceeded towards the 9th Street entrance of the Pinewood Cemetery, and just before he reached the entrance there, some distance there was a plot there with hedging around this particular plot, and he stated that he had taken Mrs. Cooper's, he showed us that he had taken the bill fold or the pocketbook and glasses and hid them in this hedge row there. He showed us the particular hedge row. The distance from the mausoleum up to the plot where the pocketbook was found is 181 feet. Yes, that was measured. He stated that he then proceeded on out the 9th Street entrance of Pinewood Cemetery, and just before you get [fol. 64] to the Southern Railroad tracks, that he made a right turn and continued on South on the Southern Railroad tracks. At the time the relations was taken behind the Nivens tombstone, he stated that he did tear Mrs. Cooper's panties on the side or down the side. After he reinacted the crime we came back to the detective division of the police department. Then at that time, Captain McCall, after he had reinacted the crime, stated that "we have to have the other evidence which was involved", the prison

clothes which he had on and so Elmer stated that he would take us and show us the clothes that he had on when he committed this offense. He stated that they were on the P & N Railroad.

We went down Morehead Street to west, down South Graham to Morehead and turned right, and came to the vicinity of Summitt Avenue and Davis told us to turn right on South Summitt Avenue which we did and came to the P & N tracks, he stated to stop here. We stopped there and parked the auto, and he said that they were down the tracks somewhere where he had thrown them. Then we began to make a search of the area for the clothes along with Davis, he was very helpful in trying to show us some clothing and within I would say 100 to 200 yards, Davis said, "Here is the clothes which he had thrown away, and these clothes were obtained there down the railroad bank on some bushes. Yes, these are the clothes. We then questioned him in regard to the prison shoes, he stated that they were in a thicket or in some bushes at the 7th Street entrance of Elmwood Cemetery. We proceeded to 7th Street by Smith Street and when we got to 7th Street on Smith, he said to make a left turn and we made a left turn and went to where 7th Street entered the Southern Railroad tracks which is an entrance into Elmwood Cemetery, we got out of the car and he taken us some 30 or 40 feet back south on the tracks when he went in some bushes and there is where he went in and pulled out the shoes and brought them back to us. Yes, these are the shoes that were pulled out of the bushes by Elmer Davis. When he got rid of the shoes, he [fol. 65] stated that he found a man there drunk, and that he had taken his pocketbook and then taken his shoes and socks, as well as I remember, and other credentials, which he changed shoes right at this place where he had discarded his. He showed us the shoes he took from this individual. These shoes were the shoes that Elmer Davis had on and was wearing at the time he was arrested. He first stated that he had stolen these shoes from a house between Canton and Asheville where he had discarded his prison clothes and other clothes. On October 6th he stated that that was the shoes that he had taken off a drunk at the 7th Street entrance or some 75 feet from the entrance. He stated that he did that after the killing of Mrs. Cooper. On October

6th, that is the date that he said he taken them off the man. He stated that he had taken these on Saturday afternoon. No, he stated he had taken these shoes on the Sunday afternoon after the murder. It was, he said somewhere in the neighborhood of 5 o'clock when he got these shoes. After that, we proceeded back to, after we recovered the shoes and after Elmer stated that he had taken these shoes from the drunk at this particular area, we proceeded back to the police department. Yes, that is where the statement was dictated when he signed. State's Exhibit No. 1 represents the picture of the Dixon Cooper plot where the flowers, fresh flowers of Mrs. Cooper's grave and her mothers, and that is the bench which Mrs. Cooper that Elmer said that Mrs. Cooper was sitting on. Right at these trees right here is where he told me he crossed over the fence. The corner of the Nivens tombstone and grave is adjacent right to this, right here is the corner, and I am pointing on this photograph where Mrs. Dixon, that is the mother of the deceased grave is, this is Mrs. Dixon's grave. This photograph, marked State's Exhibit No. 2, is the Nivens plot right there, Nivens grave. He said he killed or committed this sexual offense behind between the fence and the rear of the tombstone. This exhibit, marked State's Exhibit No. 11, is the rear of the Nivens tombstone, this is the tree and the fence that separates the Pinewood area, and these pictures were taken prior to the time that he gave us this confession, and at the time these pictures were taken after the act or offense occurred, there was a hairnet found right here behind this stone. That was the day after. I am not sure, I don't think the pictures were taken on the 21st. No, it was a couple of [fol. 66] days later after that, I don't know exactly what date. This exhibit is from the East to the West of the Nivens tombstone. Yes, it accurately portrays and properly depicts the back side of the Nivens tombstone as I found it there on that day. (Whereupon the document marked State's Exhibit No. 11 was received in evidence.)

That photograph, marked State's Exhibit No. 12, is of the gate which leads from the Pinewood area of the cemetery, Elmwood Cemetery, to Pinewood which this gate is customarily locked at all times. He stated that he did not go through this gate but came across the fence, the wire of which is down, going from the Elmwood into the Pinewood.

Yes, that was when he had the body. This photograph accurately and properly represent the gate and that portion of the fence as it was on the 20th of September. (Whereupon the photograph marked State's Exhibit No. 12 was received in evidence.)

This picture, marked State's Exhibit No. 13, is from the direction of the Elmwood Cemetery North across the Pinewood area of Elmwood Cemetery to the mausoleum in which the body was found, and which Davis in that direction taken us to this mausoleum and showed us how he had put the body into this particular mausoleum or as he called it the little house. This photograph represents the location as Davis described it to me after he crossed over the fence and started down to the mausoleum. That photograph accurately and properly depicts the Jones Mausoleum from that particular distance. (Whereupon the photograph marked State's Exhibit No. 13 was received in evidence.)

That is a picture, marked State's Exhibit No. 3, of the mausoleum in which the body was found on September 20, 1959, and this is the portrait of the hole which was entered nine and a half by eighteen and a half, Davis stated that he pushed the body in through this particular hole and then went in himself and drug the body over to this side of the mausoleum so it would not be seen. Yes, to the left side as you face it. This would be to the right where the hole is there.

This photograph, marked State's Exhibit No. 14, is from the mausoleum in an easterly direction towards the hedge plot in which the pocketbook of Mrs. Cooper was found. No Sir, this photograph does not show the place where the pocketbook was found. That is myself standing there, this is towards the 9th Street entrance of Pinewood Cemetery, [fol. 67] the hedge plot is to the left there. I would say it is approximately 50 feet from the point where I am standing in the photograph is this hedge plot where the pocketbook and glasses were found. That was not measured. Yes, it would be looking to the left of where I am standing. This photograph accurately and properly portrays and depicts and describes that part of the cemetery which I just talked about. (Whereupon the photograph marked State's Exhibit No. 14 was received in evidence.)

This is a photograph, marked State's Exhibit No. 15,

in a northern direction from the cemetery right at the 9th Street entrance of Pinewood Cemetery, this is the hedge plot which Davis showed us where he had hidden the pocketbook, there is a piece of paper which could be identified as where the pocketbook was stuck down into the hedging in between this hedging which has a little separation in it. Yes, I put that white piece of paper to show that. Yes, this is the bush that he told us he stuck the purse in. He told us that he put the glasses in this particular area. This photograph accurately and properly depicts and describes that part of the cemetery which I have just mentioned. (Whereupon the photograph marked State's Exhibit No. 15 was received in evidence.)

This is a photograph, marked State's Exhibit No. 16, on the Southern Railway tracks at the 7th Street entrance to Elmwood Cemetery and over here right in this direction, where Davis taken us to where he hid his shoes and obtained them (other shoes). No, this piece of paper on there does not represent anything. I would say it was right in the lower part where Davis told us he got the shoes. Yes, it would be adjacent to the tracks. That is the office building of Elmwood Cemetery. Yes, that is the 7th Street entrance. This photograph accurately portrays the 7th Street entrance to the cemetery and that part of the railroad track that is adjacent to the place where the Defendant told me he got the shoes. (Whereupon the photograph marked State's Exhibit No. 16 was received in evidence.)

This is the picture, marked State's Exhibit No. 17, from in an eastern direction from the Southern Railroad tracks which were on the picture just shown. Yes, this is on the lower right compared to No. 16, in an eastern direction. This is a piece of paper, the identification I put there as to where Elmer Davis told us and pulled his shoes out of [fol. 68] the underbrush here. That white piece of paper I would say is not more than 20 feet or 25 feet from the most or nearest part of the railroad track. That is a new building there which is constructed which faces Smith Street. I don't know if it is Cooper & Ross' new building but I think it is. This exhibit accurately and properly represents the location where the Defendant told us he got

his shoes. (Whereupon the document marked State's Exhibit No. 17 was received in evidence.)

I did examine the clothing of the deceased after her body was found. The shoes I was talking about in connection with Exhibit 17 is where Elmer Davis stated that he had put his prison shoes and on the 6th of October stated that he had gotten these particular shoes from a drunk in that area. That piece of paper is exactly where his shoes were, to the left is where he obtained the other shoes from a drunk, he stated. This is a sweater which was around Mrs. Cooper in the mausoleum on September 20th, and at the time she was found she was laying, she was face down and this sweater was across the body after she was turned over, this sleeve was crammed in her mouth. That is the same sweater that is depicted in the photograph. This is a blouse which was taken from Mrs. Cooper, she had it on at the time she was found in the mausoleum and it was taken off of her at Miller & Kerns Funeral Home on the night or afternoon of September 20. That is the same blouse as depicted in this photograph. This is a coat which Mrs. Cooper was wearing at the time she was found in the mausoleum and was taken from her body at the Miller & Kerns Funeral Home on September 20. This is the skirt which Mrs. Cooper had on at the time she was found in the mausoleum and was taken from her body at the Miller & Kerns Funeral Home on September 20.

This is a slip which Mrs. Cooper had on when she was found in the mausoleum and was removed from her body at Miller & Kerns Funeral Home on September 20. This is the brassier which Mrs. Cooper had on when she was found in the mausoleum on September 20, and was removed [fol. 69] from her body at Miller & Kerns on the same day. This is also a slip that Mrs. Cooper had on at the time she was found in the mausoleum and was removed from her body at Miller & Kerns on September 20. This is also a jersey that Mrs. Cooper had on at the time she was found at the mausoleum on September 20th and was removed by Dr. Summerville at Miller & Kerns Funeral Home. This is a garter belt and also stockings that Mrs. Cooper had on when she was found in the mausoleum on September 20, and was removed from her body at Miller & Kerns Funeral

Home. And this is the shoes that Mrs. Cooper had on at the time she was found in the mausoleum and removed from her body on September 20, 1959. This is a handkerchief, I am not too sure about this handkerchief, I don't know where it came from. I am not sure about where this was found.

I do not know who owned those panties. I was present when they were found. These panties were found 66 feet from the gate or the fence where the hole was from the Elmwood to the Pinewood cemetery in the direction of the mausoleum. From the fence, a hole which Davis stated he carried the body through. Yes Sir, this picture shows the part that I measured. These panties were found on the same afternoon or night of the offense. Yes, of the murder.

By Mr. Walker:

Q. Do you know what this is on the back side of these panties?

Mr. Bell: Object.
The Court: If he knows, objection overruled.

A. It is secretion.
Q. Excretion?
A. Yes.
Q. Is that what it is?
A. Yes.

Mr. Nivens: If the Court please, I object and would like to be heard, and move to strike.
The Court: Motion to strike denied.

(Defendant's Exception #9)

[fol. 70] This is a skirt. The brown spot on that item of clothing is excretion and urine which was on the body of Mrs. Cooper at the time she was found. There were no panties in the bag marked Exhibit No. 24. The deceased did not have on any panties when she was found. I am holding in my hand now another slip that was worn by Mrs. Cooper. It is taken from the bag marked Exhibit No. 24. The brown spot on that slip is excretion and urine. That is the pocketbook which was found in a newspaper in the hedging in Pinewood Cemetery where Elmer Davis stated

that he had placed the pocketbook. It was found on the following day, the 21st of September. I was present when the pocketbook was found. It was wrapped in newspaper in a hedge row. It was found in the Pinewood Cemetery at the 9th Street entrance or close by in a hedge row, it was wrapped up in a newspaper and it was crammed down in the hedging. I had been by that particular hedge before. I had not seen the pocketbook prior to that time. I had walked through this area several times, right in here looking for physical evidence in this case. At that time we had a crew of the cemetery employees canvassing or helping us canvass the area. As I was walking along here, some one in the searching party hollered. I was right at the entrance, about 15 feet from it. After this person hollered, I said, "Don't touch anything." I proceeded to this area with Detective Fesperman and myself, looked down in the hedge and seen the paper. Detective Fesperman run his hand down in there and pulled the paper out, the bundle of paper and there the paper was unwrapped and this was the contents of that particular piece of paper.

That exhibit is a hairnet. It was found in the presence of Captain McCall and myself behind the Nivens tombstone. It was found on September 21, 1959. Yes, the next day. It was found in the morning around 9 o'clock, between 8 and 9 to the best of my knowledge.

I was present when the statement was dictated to the defendant. Captain McCall, Lieutenant Sykes, Earl Fesper-
[fol. 71] man, H. C. Gardner, Claude Davis and myself were present at that time. I did Sir see the Defendant sign his name to the second page. I also signed. I heard that statement dictated to the Defendant. Captain McCall dictated this to Davis, and at intervals he would stop, and ask Davis if what he had said was correct, and Davis would say "Yes". Exactly how many times he stopped during the whole statement I could not say, but I would guess at around six or seven times. He would say, "Yes Sir, that is correct." Before he signed it, Captain McCall told him that he could not promise him anything, and that anything that he might say would be held against him, he did not have to say anything or make any statement now whatsoever, and that he could—it could be for him or against him in Court. When I say Davis, I am talking about Claude

Davis, who was at the time a stenographer in the detective division and is now with the secret service. When I say Captain McCall dictated to Davis, I am talking about Claude Davis, his secretary. When I say Davis several times said that was correct, I am talking about Elmer Davis. Yes, the defendant in this case.

Cross-examination.

By Mr. Nivens:

Yes, Lieutenant Sykes and Mr. Fesperman were with me on this occasion when Elmer Davis took us to reinact this crime. Yes, I was present with the officers the first day that they found out that the deceased was there in the mausoleum. I had already found several of the articles of clothing that belonged to the deceased prior to the time that Elmer Davis took me out there. Yes, he took me for the express purpose of verifying what had already been found. I have been a member of the City police force thirteen years the first of the past November. I went with the detective division in December, 1952. I have had some schooling in crime detection prior to the time I went with the detective division, yes. Well, I taken a course of special training at the Chapel Hill School on arson and I had other training that we have had at a school in the Charlotte Police School and [fol. 72] Municipal Air Force at Morris Field. Yes, I learned in school about the use and benefits and techniques of finger printing. Yes Sir, I was satisfied with what this defendant had stated about his commission of the crime. When I was familiar with the case since it happened and when Elmer Davis reinacted the crime scene, I was very much sure of him, or sure that he was the one. I don't know of any other way the case could be any tighter. I was able to tell that the item of secretion on some of these clothes were urine, for the simple reason that where this was and the portion of the body in which it was found. There was no blood, there was only secretion and urine in this portion. On these clothing and where it came from, yes I reached the conclusion it was secretion or urine. No, I did not use the term excretion to mean the expulsion of some sex organism. I meant bowel movement.

At the time we found the panties, yes we assumed that

they belonged to the deceased. That is correct, this place has been frequently inhabited by a number of person, bums and human derilects. No Sir, I have not found this place occupied by drunks. Not to my knowledge do I know whether or not any people have ever gone out there in the cemetery and had sexual intercourse. I did not determine to find out whether or not the clothes that I found that belonged to the Defendant here had any of those articles on them. I looked the clothes over but not thoroughly. I could not see anything on them with the eye. No Sir, I did not find any blood. No, I did not find any excretion that I was talking about a while ago. No, I did not find any urine on them. That is correct the man stated to me that he carried this woman all the distance in his arms from one part of the cemetery to another. Yes Sir, I was rather exact in determining the distance from one place to another that was pointed out to me by the defendant. In my opinion it had significant implication on this case. From the route in which Elmer Davis taken us and the measurements made, I think that it did have a lot of influence on this particular case. That was not entirely left up to me to [fol. 73] find any finger prints of this man, that would be for Captain McCall. Yes, there was an attempt made to obtain finger prints. Yes, we have a first class finger print expert with the City of Charlotte. Yes, we have one in the police department. It would be impossible to fingerprint that pocketbook even though I am not a fingerprint expert technician. All of the physical evidence which was found in the mausoleum at the time the body was found such as marble and such was taken to the identification bureau but they were unable to come up with any prints. The information from the identification bureau was that they came up with no prints.

Captain McCall, Lieutenant Sykes, Claude Davis, H. C. Gardner and myself were present at the time this boy gave this written confession. That is correct, during the time when Captain McCall was dictating this confession to the stenographer, he stopped several times to ask Elmer Davis was that right. That was during the intervals that, "Did you understand what I was saying", and his answer was always "That is right". No Sir, that did not just come to my mind. That is not true that I knew the course that

had been followed by the perpetrator of this crime and took the defendant out there to follow on the course. No Sir, it would not be a reflection on the city police department and the city detective division if the person who committed this crime was not apprehended.

I did take the dimensions and distances of various points located out here in this area and of the diameter of the hole through which the Defendant said he carried the deceased. The hole is nine and a half inches by eighteen and a half. The wire or fence was flexible. The wire was torn loose from the post and anyone sitting on the wire, it would go down. The wire actually when put there would have been a stiff wire but it is used and crossed so much by different people, at that time it was flexible and even a child could have put his hands on it and it would have gone down. I certainly do believe a man of this size with a woman in his arms the size of the deceased could have gone through a hole that small.

[fol. 74] I did not go to Gaston County with the rest of the officers to pick up this prisoner. I do not know whether he was weighed or not. I do not know whether anybody took his height but may I explain that. The custom is for the police department when a man is brought in there for his height and weight to be taken by the identification bureau. I do not know whether or not anybody took his weight and measurement of the waistline to determine whether or not it is physically possible for him to come through this fence or go through this hole in the mausoleum. We did not ask him to go through this hole when we took him back to the cemetery to reinact the crime. Because for the simple reason that the measurement had already been secured and this hole had been nailed up by the cemetery authorities. No, I was not afraid to knock the hole back open. Yes, I would like to have the truth to come to the jury. When he reinacted the crime at the time I was there, I could have got in the hole myself. I was thoroughly satisfied in my own mind that he could have gone through the hole very easily. Yes, I can go through a hole nine inches wide by eighteen.

I did question people out there concerning the commission of this crime the day the lady was found. Yes Sir, I did bring somebody out there to the police court for investiga-

tion. There was a James Leroy Ivey brought to the station for investigation, there was a Victor Clyde Hill brought to the station for questioning in regard to this. There was a John Shannon questioned on this matter, he was just at the station. The man I was just mentioning was giving information as to what he had seen a colored man crouching in the bushes at the area of Mrs. Cooper's mother's grave. No Sir, it was a white person. I was not looking for any person of any particular race concerning this trial, no. The last name of the man I mentioned is John Shannon. No it was not only after Mr. Shannon told me that he saw a colored man crouched in the hedges that I began to pursue some colored person who probably could meet the description. Mr. Shannon was there with his mother and they were in the Elmwood Cemetery part, his mother and father. That is true, that eliminated him from my suspicion. And [fol. 75] may I explain that, up until this case was solved, there was no one eliminated as a suspect, white or colored.

No Sir, it has not been customary that the confessor sign all pages of the confession. I may explain that that particular statement is self-explanatory, it continues from one page to the other. It would not be easy for one to shift or change one to the front page of that, that is something I never have done or never will do. Not in our Charlotte Police Department, no. Not in this particular case it would not have because they were under lock and key from the time that they were signed until they were shown to Mr. Bell, Attorney Bell. In my opinion, no the pages could not be changed before they were locked up. At the time he made the statement to my knowledge, yes this written statement contains all that the defendant said about this case. Yes, I heard this defendant testify that of all of the officers that I had given him more food than anybody else. I had on special occasions that it was call for. Yes, I gave it to him. I could not say that he got a little more from me than the other persons confined over there, I don't know. He stated I gave him cigarettes and peanuts. Yes, I gave him cigarettes and peanuts. I could not say that even though I was nicer to him than any other officer, he waited to make this confession in front of Lieutenant Sykes who had been on vacation, all the time he was in jail. That is true, he selected Lieutenant Sykes to confess to. Yes, Lieutenant

Sykes had been on his vacation. No, not to my knowledge he had spent no time with the prisoner. I did not make the statement to the defendant that "As nice as I have been to you, you should go ahead and confess".

Redirect examination.

By Mr. Walker:

No Sir, I did not find any blood on any of Mrs. Cooper's clothes. Yes, the hole in the Jones Mausoleum door is nine and a half inches by eighteen and a half. Yes, that is the one I say I can get in without any trouble, there is a panel [fol. 76] taken from that particular door. The hole in the fence is where the wire is down below the gate where entrance was made from the Pinewood Cemetery across from the Elmwood to the Pinewood Cemetery. That is a good large hole, that particular hole was not measured but the wire, the post stand like this, the wire is torn from the post almost to the ground and then the wire comes back this way to the other post and a line which strengthens the top which was torn off there. Yes, that is where he told me he carried the body across.

Recross-examination.

By Mr. Nivens:

The defendant carried the body across the wire which was down, the post is like this, there is a gate right here to the east of this post, the post is like this, the post wire had been torn from post from the nail which attached it to this post down practically to the ground and then the wire comes to an angle this way which is pushed, the wires is pushed down, anyone can step over it or across under there without any trouble at all. Yes, go through the hole without any trouble at all. Yes, the defendant told me that he went through it. Yes, this post was supporting a gate to a fence which leads from the Elmwood Cemetery into the Pinewood area of the cemetery. No Sir, there were no jaggered ends of wire left there. The top of this wire which had a larger wire which the others were connected with was the top portion of the wire which had been forced down just like any

continuation of going over any fence it will eventually sag and keep on sagging the more it is used to go over. No Sir, there were no loose ends, not that would interfere with anyone going over. It is where it pulled the nail, it was pulled from the staple or whatever secured it to the post that was attached to. There were no holes that I know of or torn places in the Defendant's clothes that I found on the railroad track. I did not see any blood on the deceased clothes, no. This would be that particular portion of this clothes was crammed into the deceased mouth which I would think would be slobber or maybe some blood. This was on the bottom side right where at the rectum of the deceased. [fol. 77] Of course, there was no blood, only excretion or urine. That is a jersey which was under the coat. Dr. Summerville cut that loose when he was taking the clothes from the body at the Miller & Kerns Funeral Home. Yes, he cut a lot of these clothing, that particular one he did, in order to remove the clothes from the body. I do not know what the stain on this piece of garment is. I do not know if it looks like blood. That is correct, I heard Dr. Summerville testify that the deceased had several wounds from which she could have died. That is true, I only mentioned the crime to the defendant once before he confessed. That was on Monday the 5th before the 6th of October. I asked him his whereabouts on this particular date of September 20, and that is, this particular matter of the woman in the cemetery, and asked him if he did do the killing of the woman in the cemetery and he stated that he did not, and the questions were carried on about where the clothing came from that he was wearing, and he still stated that the clothing had come from up in the mountains or up around Hickory, up near Asheville. That was a very short interview, we did not keep him out too long, and then he was put back and was not talked to again until the next day. Yes Sir, I asked him specifically if he committed this crime. Yes, he said no.

W. Fred Hucks returned to the witness stand:

Redirect examination.

By Mr. Walker:

Yes, that is correct, I testified that the written statement contained all of his statement at that time. I did talk with him again. That was after the statement had been made. At that time Captain McCall and myself were in the office and he called Dr. Summerville, the coroner. I did not hear what Dr. Summerville said. The defendant was not present. Based on what Captain McCall said to me, I went to the jail and brought Elmer back to the office, and Captain McCall and myself were there, and Captain McCall stated that the woman had definitely been raped. At that point Elmer stated that, Captain McCall asked him if he did make [fol. 78] an injection with his penis in her vagina, and in that state, and Elmer said that after he finished with his mouth, and in her vagina, at this time he was masterbating and at the climax of this masterbation is when Elmer stated that he had made an injection into the body of Mrs. Cooper. He said he injected or inserted his penis in her vagina.

Recross-examination.

By Mr. Nivens:

That is correct he made the statement to Captain McCall that he was masterbating during the time when he was sucking the deceased lady's private parts. He stated that when he reached the climax, then he inserted his penis into the vagina of Mrs. Cooper. I could not answer that it is impossible for a man to insert his penis into a woman's vagina during the time when he is reaching his climax.

I did not put this in the written confession that he made for the simple reason that the statement had already been made and had been witnessed by the other officers that were present. I possibly could have written another statement, yes. Yes, I was satisfied that this was the man who committed the crime after I went over the facts. No, I was not satisfied on the basis of the confession. No Sir, his confession did not play a part in it. Yes, I have had peo-

ple to confess to the commission of crimes. That I have had any dealings with, I have indicated the crimes that they admitted and the evidence showed that they were guilty.

At the time I said, yes the written confession included all statements made by the Defendant pertaining to this trial. No Sir, I have not gone home and changed my mind. At the time he made the statement, at the time of the confession being written, that is all Elmer stated. The reinactment of the crime was the first. He confessed orally first and then the statement was made. That is correct, then the written statement. At that time, yes, the written statement included all, everything that was said by the [fol. 79] Defendant. All the confessions I know of is what I have testified to. As far as I know Elmer Davis gave a statement concerning the killing of the deceased one time.

(Witness excused)

JOHNNIE SIMPSON testified as follows:

Direct examination.

By Mr. Walker:

My name in Johnnie Simpson, Junior. Yes Sir, I was sworn the first day or Tuesday. I live at 154 Piedmont Courts. I have lived in Charlotte all of my life, about 29 years. I work at H & S Roofing Company. On the 20th of September, I was working at H & S Roofing Company. I was in the Elmwood Cemetery on September 24th, on Thursday afternoon.

My wife and my mother and my sister and myself went down to the cemetery, because my grandmother lives down close to the cemetery, and we went down to the cemetery to the Jones Mausoleum to see where Mrs. Cooper's body had been, saw where they had found Mrs. Cooper's handbag, I was in that vicinity that afternoon with my wife and my mother and my sister and myself. I was there after the handbag had been found, and I was looking around and I knew that they had found Mrs. Cooper's handbag, but they had not found Mrs. Cooper's glasses, so we were looking around the hedges behind the Jones

Mausoleum I would say approximately 100 or 175 or 180 feet, I saw, the sun was shining that day and I saw something sparkling, so I looked down and there laid a pair of glasses at the hedge. There was only half of the glasses, there was only one lens showing. That is the round part in the glasses, so I taken a stick and raked the leaves from around the glasses, and then I asked could I have a handkerchief or napkin or something to pick them up with, I was going to call the detective bureau someone would move the glasses and take them and leave with them, so I picked them up with a paper napkin and got in the car and my sister drove the car and we came to the detective bureau here in the Charlotte Police Department, and when we [fol. 80] went upstairs, I asked for Mr. Fred Hucks, but Mr. Hucks was not in, so Mr. Gardner was there, so I gave the glasses to Mr. Gardner. Yes, I had seen them before the day I found them. Yes, I knew Mrs. Cooper. I had known Mrs. Cooper approximately four or five months. I lived approximately I would say a mile and a half or two miles from Mrs. Cooper. When my mother and myself and my wife would go to the cemetery I would see her—to see my grandfather's grave and my wife's grandfather's grave. That would be I would say approximately 200 or 275 or 280 feet from the Dixon Grave. I am not related in any way to Mrs. Cooper through blood or marriage. Those are Mrs. Cooper's glasses. On this photograph, yes, this is where I found the glasses. I found the glasses right here at the side of this hedge right here.

Cross-examination.

By Mr. Bell:

I say those are Mrs. Cooper's glasses because just like I told you a while ago, I saw her with them on. Sure I saw some glasses like that before. I saw those glasses on Mrs. Cooper. Yes, that is true, I have seen glasses like that on other people. No, there are no marks on them that would indicate that they were Mrs. Cooper's. No, I do not say they are Mrs. Cooper's glasses because they were found in the cemetery. I say those are Mrs. Cooper's glasses because the glasses were in the vicinity of where the pocketbook was.

On September 20, I was in Monroe, N. C. No, I did not live in Monroe. My wife and my uncle and my grandmother and myself were at Monroe at my aunt's. I was in Monroe from 11 o'clock Monday morning until 7 o'clock Monday night, we just got back in Charlotte about 7:30. I was not out at the cemetery about three or four o'clock on Sunday evening, the 20th. I am positive. I can verify where I was on September 20th. The last time I saw Mrs. Cooper alive about I would say, I am not sure exactly but I would say it was two or three weeks before she was mur-
[fol. 81] dered. I would not say for sure. Sure, I paid a lot of attention to the glasses, I stood right beside her. No, not everytime was I standing beside her, but where we, Mrs. Cooper and ourselves, we always went in the same way. Yes, I am sure I did not kill this woman.

(Witness excused)

BISHAL BUREN HAYES testified as follows:

Direct examination.

By Mr. Down:

My name is Bishal Buren Hayes, I live in Spartanburg, S. C. On September 20, 1959, I come from Spartanburg to Charlotte, I arrived here around 3:30, in the afternoon. I went up to the bus station and talked to a friend of mine for a while up there, and started over to another friend of mine over on 7th Street, and North Poplar, and I met a friend of mine from Gaffney, S. C. When I met the friend from S. C., we had a few drinks and we walked down to 6th Street and came to the railroad, and we turned left on the railroad and went down to a little patch of weeds and few little bushes there, and we sat down and drank a pint of whiskey. Well, it was on this side of the railroad track, and the graveyard was across the railroad tracks. I did not know the name of the graveyard at that time, no. Yes, I know it now, Elmwood Cemetery. Where we were, well, I reckon, it would be going south back towards the depot, I was going back down the tracks south I would say. It would be on the left hand side across the tracks.

After we drank this pint of whiskey, we made up some more money and I sent him to get a pint of whiskey, and

during the time that he was gone to get the whiskey, I laid down and went to sleep. On this particular day I had on a pair of slippers. It was a kind of a reddish color, a light tan or dark colored slipper than these here, and in the right shoe string, the right shoe string had around the string, it is a different color from the one that is in the left shoe string, but the other is a round string but a lighter color on [fol. 82] the right than it was in the left, and it has a new half sole on them and new heels that I had put on them in Spartanburg, S. C. I will say it was approximately 4:20 or approximately 4:30 when we went down by the railroad tracks and drank the whiskey. Yes, I had on these shoes that I described to the jury when my friend left to go get some more whiskey and the time I went to sleep.

Well, I had a billfold with friends' pictures of mine and my two daughters' pictures, and also had my social security card, blood donation cards and a set of driver's licenses that I have never seen before and the officers did not find them. They were North Carolina driver's licenses. No Sir, I could not say exactly how long I slept there because I was under the influence of whiskey at the time and I could not say how long I slept. It was dark when I awoke. When I awoke I found my billfold gone, my shoes and socks gone, and approximately seventy-five or eighty cents in change that I had. I had these shoes on my feet at the time, here is the string I told you about. At the time they were taken off my feet, I can't say by who but they were taken off. Yes, absolutely, I did have these shoes on at the time I went to sleep. There are distinguishing characteristics about these shoes. Here is the string that I said was a different color, it is in the right shoe, here is the other darker string that is in the left shoe. These here are the new soles and heels that I had put on in a shoe shop in Spartanburg, S.C. which had been worn by him.

The next time I saw the shoes, I will say October 6, 1959, I came to the police department, detective department from Spartanburg, S. C., and I believe it was Mr. Earl Fesperman or Mr. Fred Hucks or Mr. McCall, that asked me. I did identify these shoes as being mine. I have seen this sir, it is my social security card. This is a blood donation card that I got in Columbia, S. C., when I was working down there in a garage, here is a card that I got from a friend, and

[fol. 83] address of mine on it from Alabama, here is a card for a doctor that I used to work for, Mr. Joe Cutchen, in Dothan, Alabama, here is another blood donation card that I received from Columbia, S. C., here is another one where I was working in Raeford, Florida, Union County, on the 5th month, 27th day, 1952, where I donated blood in Raeford, Florida; that is just a little card there, here is a girl friend that I went with in Canton, N. C., Hattie Ledford, this is another little card that I had in there, here is her picture again when she is laying on the back of a 54 Plymouth that I owned at that time. Here is her sister, Mrs. Minnie Trancom, also from Canton, N. C. It is wrote on the back, "from your sister to big brother, love". Here is my two daughters that lived with me in Pea Ridge, N. C., in Polk County, Columbus is the county seat. Here is Jeannette Lake, her phone number, in Spartanburg, S. C., a girl that I went with, and here is a labor card that I was working at the Piedmont Restaurant. They were in my bill fold in my pocket on Sunday, September 20. No Sir, I did not have them on my person when I awoke that night. I saw them for the first time in the detective office in Charlotte on October 6, 1959. Yes, I did identify them as being mine. After that, well I seen I did not have on any shoes or socks, so I did not do anything else, but I went up to the Salvation Army. I could not say how far that was from the tracks near the Elmwood Cemetery in blocks Sir, But it is on North Poplar at 7th Street, and I went down, I think I was on 6th Street, I would not say, there is Pine Street, Graham Street and I came all the way up the street I would say approximately seven blocks maybe.

Well, After they gave me a pair of shoes, the next morning I did not have any money, I did not have anything and the shoes he gave me was too little for my feet, and they were blistering. I went back to Spartanburg, S. C. and the second or third week later I was notified that, by Captain Jack Fowler, to come to Charlotte, that the police had my credentials and stuff, so I came up there and Captain McCall gave me a pair of shoes because my feet were ruined from wearing the short shoes that I had on.

[fol. 84] Cross-examination.

By Mr. Bell:

I was not in the grave yard on September 20, I was on the other side of the tracks from the grave yard. I have never been in the grave yard in my life. I know because I am a man of intelligence I hope. I will say I have been tried and convicted for being drunk here in Mecklenburg County approximately three or four times. I have never been convicted in Florida. No, I would not say that I am a confirmed drunk. I was invited down to the railroad tracks to drink whiskey by a friend of mine. I thought it would be a safe place to go to take a drink of whiskey, I would not be in town. I did not go to my friend's house because he did not live in this part of the country, he lived in Gaffney, S. C. I did not at that time find any place to drink other than along the railroad track, no. I thought that it was a safe place. I sure did not go out there and get drunk. Yes Sir, I do know I did not kill this woman. I was not that drunk not to know. Because a man took my shoes and pocketbook and all of my belongings and I did not know anything about it don't have anything to do with whether I crossed there and killed a woman. No, that is the first time I had ever been there. I don't know whether my pint of whiskey ever came back or not. I don't know whether he came back or not, he might have come back, all I can say is he was not there when I got up anyway. No, there was no possibility that he came back and helped me drink that pint, if he had woke me I would have remembered it. This other man was Walter Diamonds. I don't know whether he went into the grave yard that evening, he did not go in any grave yard while I was sitting there because he went back up the street to get a pint of whiskey. Well, he was not as drunk as I was, no, I was under the influence of whiskey, he could not have been drunk. I did not see anyone else out there, but myself and Walter Diamonds. I could not have seen anybody without they walked right by the railroad track where I was sitting because I was sitting in some bushes and weeds.

[fol. 85] No, these men did not come to Spartanburg and bring me back to Charlotte, I come on my own. Captain Jack Fowler has known me all of my life, stopped me and

told me on the street that some law officer had called him from Charlotte saying that he had my credentials, and I came up here to see about them. I came to the police detective department. I talked to Mr. Earl Fess or something and Mr. Hucks and Mr. McCall, Captain McCall, and this gentleman over there, I don't know his name. Well, they just asked me could I identify this stuff. They did not exactly interrogate me in connection with this murder. No, I did not tell them I was near the graveyard at 3 o'clock, I said around 4:30, 4:20 to 4:30. I sure did tell them I was out there drunk. That is right, I told them I had gone out there and drank a pint of whiskey and had sent for another pint. They asked me did I know anything about this woman being killed, and I told him no, I did not know anything about it because I was under the influence of whiskey when I went down there and when I went down there and drank this other whiskey I went to sleep. No, they did not put me in jail to prevent me from talking to anybody.

No Sir, I don't know these men well. Well, I don't have a right to hate them any, they have done me no harm. If I was out there drunk on the street it would be their duty to lock me up and I would appreciate it. Certainly, if they was to go out to the cemetery and see me drunk, I think it was their duty to lock me up. They did not find me drunk at the time I told them I was drunk in the cemetery, I was not drunk at the time I talked to them. No, I did not kill Mrs. Foy Bell Cooper. No, my friend, Walter Diamonds, did not kill her because he got locked up. I found out later, he was locked up in the city jail. It was around dark when he left me or I will say it was getting up in the afternoon around 5 o'clock anyway when he left me and went up the street and did not go even anywhere near the cemetery. I know that because I know what time it was when I went [fols. 86-90] there, I had a watch on my arm, I could look and see. No, I did not lay down there and go to sleep about the time I got there. We stayed there and drank the rest of the pint of liquor we had and it was approximately around 4:20 or 4:30 when we got there and I guess we sat there 25 or probably 30 minutes before we drank what whiskey we had. Well, I would not say exactly to the minute I got there, probably between 20 to 30 minutes after four. I sat down and drank I will say approximately 25 or 30 minutes. Yes, Diamonds left the grave yard approximately 5

or five or ten minutes to 5. No, I do not know when he got locked up, he got locked up sometime that evening, he never did get back with the whiskey because I met him on the street later and he told me the reason he did not come back is because he had just got off the chain gang making 22 days, and he said he got locked up on the way back down there. No one told me to come here and testify in this case. After I had my stuff, they told me that I would have to be back here. Captain McCall and the detectives that questioned me about my identification stuff told me that. There was not one man told me one thing to say in this Court. Captain McCall told me, he said, "You know you will have to be back here for Court now". He told me I would have to be back and identify my stuff and testify that it was my stuff. No one paid my way down here at all. I hitchhiked down here the last time. Certainly I work, when I am not able at this time, I just got out of the hospital. It don't cost you nothing, does it to drink. I stayed in the hospital and was up here at my aunt's and I was told to come down, I don't think I am going to get drunk. I have never tasted canned heat in my life.

I woke myself up out there. Well, if you call it sleeping my drunk off, I did, yes. Yes, I was sober when I woke up.

(Witness excused)

* * * * * * *

[fol. 91] Captain W. A. McCall recalled.

Direct examination.

[fol. 92] By Mr. Downs:

My name is Captain W. A. McCall. I am captain of the detective division of the Charlotte Police Department. March 25th coming I will complete 25 years as a member of the Charlotte Police Department. I did talk to the Defendant in this case, Elmer Davis, Jr., on or about the 6th day of October, 1959. As a result of information furnished by the detectives involved in this investigation of the Foy Bell Cooper murder, the defendant was brought to my office and interrogated by me relative to the information obtained from the detectives, and I asked if he

cared to make a statement, and if he would make a statement relative to the evidence that had been gone over. He said that he would, and I in turn instructed him that I would dictate the statement as it had been related to me by he and the detectives who had complied the information during the investigation. I have seen Exhibit No. 10. It is a statement of Elmer Davis, Jr., concerning the murder of Mrs. Foy Bell Cooper. I dictated it in the presence of the Defendant, Elmer Davis, Jr., Detective Lieutenant Coy Sykes, Detective Hucks, Detective Fesperman and Detective Gardner and Detective Claude Davis who was then my secretary. I did not start at the first of this statement and dictate it completely through without any stopping. That would be hard to recall exactly the number of times I stopped during the dictation of this statement, but I would say somewhere between six and fifteen times. When I would stop my dictation, I would in turn turn to the defendant who was sitting immediately to my left, and ask him if that was not correct, and if it was not correct we would not put it in the statement, and each time the defendant would say that that is correct. I did Sir read the finished statement to the defendant. I read the finished statement to the defendant, Elmer Davis, in the presence of the detectives mentioned heretofore. After I had read it to him Elmer Davis, Jr. stated that the statement was correct and that he was happy [fol. 93] that it was over, that it had strained him.

I do Sir know whose signature that is on the right hand side of the second page of this paper writing. That is the signature of the Defendant, Elmer Davis, Jr. I did Sir see him sign that paper writing. He was not taken to Elmwood Cemetery after this statement had been signed. He was taken before. I have Sir talked to Elmer Davis, Jr. after this statement was prepared. I talked with him again after the written statement as a result of a conversation that I had with the coroner, Dr. W. M. Summerville, and having witness the autopsy at Hovis Funeral Home. I instructed Detective Hucks to bring the Defendant, Elmer Davis, Jr. back to my office where I had a conversation further with him as to whether or not he actually penetrated his penis into the vagina of the deceased. Elmer Davis stated that while he was in the act of having his mouth in the vagina, and I am speaking in terms to keep from embarrassing the

ladies of the jury, that he was masterbating himself, and that at the point he was coming into the climax, that he inserted the penis into the vagina. Those are not his words but as a matter of respect for the jury.

I did go to the Jones Mausoleum, in Elmwood Cemetery. As a result of certain evidence that was taken from the Jones Mausoleum in Pinewood Cemetery that was brought to the police headquarters by my identification man, Edward Pierczynski, that evidence that was brought in was processed for the purpose of finger prints with a negative result due to the fact that the evidence brought in was so covered in dust as a matter of accumulation over a period of years that it was utterly impossible to obtain any finger prints.

I do Sir know what Exhibit No. 1 is. This picture was made under my direction. This photograph accurately and correctly depicts the lot of the Dixon family located in Elmwood Cemetery, the mother of the deceased in this case and also the deceased grave. I did not take Elmer Davis to Elmwood Cemetery or Pinewood Cemetery.

[fol. 94] Cross-examination.

By Mr. Bell:

I command the detective division, yes. I talked to the boy on October 6, 1959. I told the Defendant, Elmer Davis, Jr., if the contents of the statement as had been read to him whereby he followed it on my desk with his finger line as it was read to him, that if it was true and correct, to sign the statement. The statement itself is explanatory, he did not have to make the statement. I did not get him to sign the first page because as previously stated, beginning the second page and reading this, "Page two of Statement of Elmer Davis, Jr., concerning murder of Mrs. Foy Bell Dixon Cooper on September 20, 1959." No sir, there is nothing on the second page about the murder of Mrs. Foy Bell Cooper. Yes, it does not say anything about anything he did. It says, "In closing, I want to say that I have known in my own mind that you people are holding me for and all the time I have been lying in jail it has been worrying me and I knew that sooner or later, I would have to tell you about it," and that is a continuation of page No. 1.

Q. You could have printed that page two weeks after you put him in Mecklenburg County jail, could you?

A. Yes, sure I could but any time that I have got to do that for any defendant, that is when I will turn in my badge and quit the Charlotte Police Department.

The Court: Just a minute, you sit back down there and quit interrupting the witness while he is answering the question that you have asked him. I can assure you that we will get along with the trial. Now then, if you will let the witness complete the answer to the question that was asked, does that complete your answer?

A. Yes.

(Defendant's Exception #10)

I positively do know that any other member of my detective division did not do that, for the simple reason that that [fol. 95] confession has, since the day he signed it as Detective Sykes said, it has been under my supervision lock and key and it is utterly impossible for a trick like you are saying to have been done. Yes, it would have been a simple matter for me to have gotten the man to put his name on it. Mr. Bell, I don't know of any law that requires me to have him sign the first page. Yes, I heard Lieutenant Sykes testify yesterday. I did not hear him say that this boy's name was not on this paper when he signed it. Yes Sir, his name was on it when Lieutenant Sykes signed it.

Q. So Lieutenant Sykes does not know what he is talking about, does he?

Mr. Walker: Object.

The Court: Sustained.

A. The Defendant——

Mr. Walker: You don't have to answer that.

A. I never did get to finish the first question.

By Mr. Bell:

Q. I say Lieutenant Sykes did not know whether he signed——

The Court: I sustained the objection to that question, and direct you again to have a seat and ask your questions from a sitting position.

Mr. Bell: Your Honor——

The Court: We are not in Recorder's Court, we are trying a man as you have pointed out several times during this trial for his life, we have not got and we are not having a Roman circus.

(Defendant's Exception #11)

No Sir, we were not looking for this boy before the Belmont police apprehended him, we were looking for a likely suspect in this case. Yes Sir, we were looking for him as a result of his being an escaped convict and incarcerated for 25 years for attempted rape. Yes, we sent for him because we wanted to investigate this case. Lieutenant Gilleland, Detectives Holmeberg and Gardner went over and brought him back. Yes Sir, that is an arrest ticket made out in the Charlotte Police Department. No, I don't know when It [fol. 96] was made. Yes, these records are kept in the record department of the Charlotte Police Department. Yes, I know that that written record was kept in the department. Yes, I know who brought it over here. Captain John W. Yandell brought it over here, he commands the record bureau division of the Charlotte Police Department. Yes, he brought that same record over here. No Sir, I did not direct any of my officers to hold this man in jail without allowing him to communicate with any members of his family, forbidding him to talk to anybody, forbidding him to use the telephone, I did not order any orders like that. He was put in our jail on September 21, 1959, and at the time this statement was dictated by me was October 6. Mr. Hucks and Mr. Fesperman were assigned to the case, they answered the original call on September 20 at the mausoleum in Elmwood Cemetery. They talked to him at various intervals throughout this period. No Sir, I don't know that this boy told my officers on numerous occasions that he knew nothing about this case, Mr. Bell, for your information the way this investigation was handled, the Defendant was an escaped convict serving 17 to 25 years as a result of an attempted rape and robbery just two blocks from where this took place. So therefore, him being

an escaped convict we had to break down all of his alibis from the time he escaped from Haywood County, N. C., which is above Asheville, to where he had been, what he had been doing, with whom he had been, where he got the clothes, etc., where he got the jewelry, where he had them, where he had this, as a result of him admitting that he had committed a number of felonies in various counties in the western part of the state, we were running out the various leads to prove them, every alibi he had. So far as the murder case of Mrs. Foy Bell Cooper, to my knowledge the case was never mentioned to him until Friday before he made his confession on Tuesday, which I believe would have been the 2nd of October.

Yes Sir, the man was in jail for three weeks without the crime being mentioned to him, with an explanation. The [fol. 97] Defendant at the time he was in jail was an escaped convict, and was a likely suspect in this case that we were investigating. On September 23rd, I called Raleigh, N. C., to Mr. J. D. Wilson, who is the supervisor of consolidated records for the penal division, and so advised him that we had the defendant, Elmer Davis, in jail, and that he was a prime suspect in our case.

By Mr. Bell:

Q. Captain, don't you know that the law compels you to charge a man with a crime if you put him in jail within twelve hours?

Mr. Walker: Object.
The Court: Sustained.

(Defendant's Exception #12)

No, if he had not confessed to this crime, he would not be in that jail, he would be turned back over to the State of North Carolina to serve the balance of the term whenever we found out that we did not have sufficient evidence against him. No Sir, we did not have sufficient evidence to try him for his life before he signed this paper.

He did not ask me one single time for something to eat. The boy was properly fed insofar as the law requires us to feed them. Mr. Bell, we have never held a prisoner incognito and any time you will find a prisoner has suf-

ficient food to live while incarcerated in the city jail as a matter of humanity and when a man is not the detectives handling the case will see that he gets extra food. He was being held as a result of an escaped convict and the investigation in this case. Well, I think I could live three weeks on four sandwiches a day. Yes Sir, according to what Mr. Hucks told me the day that they took him back to Canton and wanted to run from Canton down to Asheville and break down an alibi that he claimed he had broken into a number of houses up there, that Mr. Hucks had no place to feed him and took him to his home on the way out of town and fed him.

I certainly do have something to do with crimes in other counties. I am a sworn officer to uphold the laws of the [fol. 98] State of North Carolina and if any felony is committed in any community I don't care what state it is in it is my duty to investigate. Yes, as long as it has a local aspect to it or is a matter of cooperation with any law enforcement division in the State of North Carolina or Federal Government if we can assist them, and they in turn give us the same assistance in any crime that we have committed locally. Yes, Mr. Hucks said on the witness stand that he gave him a hot meal at his home. I believe that yes, he had a hot meal right across from my desk, in fact he ate it off my desk. No sir, Mr. Bell, I did not tell him I would see that he got some food if he confessed. The man did not have to sign a statement, the statement speaks for itself, and he was instructed that he did not have to make a statement if he did not want to. I could not say that he is the only man ever held in jail two weeks without charge. I don't know who else has been held in jail that long. The man was charged, Mr. Bell, he was an escaped convict, he was a prisoner of the State of North Carolina. We did not send him back because we were investigating this case. I had permission to keep him as long as I saw fit, wherever we have not got sufficient evidence to bring charges against one, we release him back to the State of North Carolina. No Sir, not as long as six months or two years. Whenever we came to the conclusion that we do not have sufficient evidence to convict a man we so appraise them and we turn him back to the State of North Carolina. We could have put him in the county jail and made investigation from

there. I did not intend to turn him loose. No Sir, that is not why I was keeping him up there until he signed this confession, he was a prisoner of the State of North Carolina, I could not turn him loose. No Sir, this is not a state prison or jail over here in the city. I had him for investigation of crimes as a result of being an escaped convict, he was being held. Yes, the State of North Carolina has asked me to hold a state prisoner. No Sir, I can't show you any correspondence that Mr. Bailey who is director of prisons [fol. 99] asked me to hold this man for any length of time, but I can show you the record of a telephone that I made to Mr. Wilson who is supervisor of the consolidated records, whenever we apprehend any escaped convict he is the man that we contact. If he did not have some way to transport them we could hold him.

I don't know, it is possible I could have ordered this boy to be held without privilege of communicating with his friends, relatives and held without the privilege of using the telephone or without the privilege of talking to anybody. I don't know whether I told the jury or not that I did not do it. Yes, I care. No, I did not want him to talk to anybody. For the simple reason he was an escaped convict and it is the rules and regulations of the penal system that if he is a C grade prisoner he is not permitted to see anyone alone or write anyone letters and I was trying to conform to the state regulations. Yes, Mr. Bell, I know that any prisoner in the state penal division can see his own people. Lieutenant Sykes finally located them and they came down and saw him. No Sir, not after he had signed this confession. No, I don't know that it was after that. I am telling the truth. I don't know whether his sister came down before the confession or after the confession. It was some time during the time he was there. She saw him in the city jail. Mr. Bell, I know of my own knowledge that his sister came to the city jail because I talked to the girl myself and I have no reason to lie for or against the boy. No Sir, I don't know how much education he had. I know this, that he followed the statement when it was read to him line for line and has been reading the Bible all during the Court in this trial.

The same officers that heard me dictate the statement were in the room when he signed the confession. And all

of them heard me tell him that if that was not the truth he did not have to sign, he did not have to make the statement. They were Lieutenant Coy Sykes, Detective Fred Hucks, Mr. Fesperman, Mr. Homer Gardner, Mr. Claude Davis and myself. Yes, we go armed.

[fol. 100] Q. Why did you not bring someone else in there at the time he was going to confess?

A. Well, Mr. Bell, we are not in the habit of bringing outsiders and attorneys in when a confession is made.

Q. You did not think it was that important?

A. Well, if you jurors or the Court don't believe what the six officers or five officers and myself have to say about this case, all I can do, we have presented the case as fairly and squarely and presented the evidence to the Court as we obtained it, without promise, threats, duress or anything.

Mr. Bell: I move the strike that as not responsive.

The Court: Motion denied.

(Defendant's Exception #13)

He called the mausoleum little house. I put it in there because it is a mausoleum. Yes, I dictated it. I dictated both pages and read both of them to him and he signed the second page. It certainly is written in my language, that is a recapitulation of exactly what took place at different times according to him and the detectives. No Sir, Mr. Bell, I did not intend to put it on anybody. I am a sworn police officer to Almighty God to uphold the law, in the State of North Carolina, and protect life, property and apprehend criminals if possible who commit crimes, and I have had confessions in other cases but where I did not have evidence to substantiate a confession you have never heard me try a man on his confession. Yes, I heard that these other drunks, vagabonds and derelicts were out there in the same vicinity when this thing happened, we had a couple or three of them down at the station. I could not tell you how many people were out there, I know we investigated a number of people that were out there. We never did get hold of the man sitting up there until he came to the office as a result of our investigation, we finally got him located in Spartanburg, S. C. and he was questioned

about it. He was questioned by Mr. Hucks and Mr. Fesperman. No, not in my presence.

[fol. 101] The two drunks that this young man spoke of this morning were in the vicinity at the time this thing happened. I certainly did have them brought in. I don't recall the names, the records speak for themselves, and interrogated them thoroughly. I possibly put them in jail for two days. I believe they were in jail two days. Yes, in connection with this crime. Mr. Hucks will have to give you their names, I don't recall. It is utterly impossible for me to remember. Yes, we gave them something to eat, the same thing that the Defendant got. No, we did not give them one sandwich a day, they got four sandwiches a day, each prisoner gets four and some get five if they want, he can get six if there is any left over and if somebody gets out of jail, you know what the procedure is over there.

Q. Have you ever read General Statute 15-47?

Mr. Walker: Object.
The Court: Sustained.

(Defendant's Exception #14)

By Mr. Bell:

Q. Do you know the requirement of the State in reference to keeping prisoners without charging them with any crime?

Mr. Walker: Object.
The Court: Sustained.

(Defendant's Exception #15)

Because he signed this confession is positively not the only reason that I think this man committed this crime. He was arrested before he ever signed the confession. I don't know that this warrant was signed by Mr. Hucks, I don't know that it was signed on October 6th. I know that there was a warrant signed against him at my instructions. I did tell the jury he was arrested on September 21st. The Defendant was arrested on Monday after September 20th by the Belmont Police Department on September 21st, he was brought to our jail and put in our jail on September 21st and was, a warrant was signed against him on October

[fol. 102] 6th for murder. He was arrested by the Belmont police as an escaped convict serving time of 17 to 25 years. We did not have to take a warrant. We went over there and got him. No, I did not go. Lieutenant Gilleland got him out of jail.

Redirect examination.

By Mr. Downs:

Mr. Fesperman is in the hospital recuperating from an operation that he had Tuesday a week ago.

(Witness excused)

W. Fred Hucks recalled:

Direct examination.

By Mr. Walker:

The Defendant did request me to contact some of his friends or relatives for him. It was before the charge was filed against him. It was the date that we came back from Canton and Asheville which was on Thursday before the Tuesday that the statement was made. As a result of that I, he stated that she lived in the Wilmont road section. We went to that section and inquired. It taken us approximately 45 minutes to find where she lived. We talked with her. She would not come at that time on account of the children that she had but she stated that she would come to see him as soon as she got a chance. I know, Sir, she did come. After that we talked with Elmer and we asked him had she come and he stated that she did not. That is the only person he asked to see.

Cross-examination.

By Mr. Nivens:

As far as I know his sister never did come to see him. The request was made on Thursday as well as I remember before October 6th. Or was it in September, it was on Thursday as well as I remember. It was Thursday or Friday prior to the 6th of October. I did not know of any

instructions that had been left with the police department demanding that this boy not be allowed to see his relatives or friends. No, I have not seen them.

[fol. 103] No, I or any officers did not attempt to find out whether Mrs. Cooper owned any property. Not to my personal knowledge to I know that Mrs. Cooper owned any property. I seen two insurance policies, yes. No, I don't know where the insurance policies are. Her son had them.

(Witness excused)

HOMER GARDNER recalled:

Direct examination.

By Mr. Downs:

My name is Homer Gardner. I am employed by the city as city detective. I have been a member of the city police department 33 years January 11th. I have been a detective in the city police department approximately 27 years. That is my signature on Exhibit No. 10. I did hear this paper writing read to the Defendant Elmer Davis, Jr., prior to the time he signed it.

Cross-examination.

By Mr. Bell:

I did not hear Captain McCall tell him to sign the paper writing. I did hear a conversation between Captain McCall and the Defendant. I heard Captain McCall ask him to sign it if he wanted to. I was in Court this morning when Captain McCall testified. He was locked up on the night of September 21, 1959. Yes, that is what the record shows. I believe he stayed in the city jail until October 6, 1959. The warrant was signed on the evening of October 6th, 1959. I don't know who signed it, I was not present. I had talked to this man before October 6th. I did not ask him whether he had committed this crime or not. I talked to him about other cases but not this one. Not at that time had I mentioned it to him. Never mentioned it to him a time before October 6th. I have heard Detective Hucks and Detective Fesperman question him before October 6th. I did not

hear them talk to him about this crime. No, not before October 6th. I did not go to Belmont to get him along with the other officers. I would say it was on about October [fol. 104] 23 or 24, I mean September 23 or 24 when I found out he was in the city jail. He had been in there two or three days before I knew about it, that is correct. I was asked by Captain McCall to assist these two men with the investigation of this case. I said I began investigating it approximately on the 22nd, I would not say for certain it was on the 22nd or 23rd but it was that week. I would say I went in and got him twice before he signed this statement. I did not ever mention this crime to him. I did not mention this crime to him on either occasion. I talked to him about the articles he had on and his shoes and the jewelry and about the pictures he had. I wanted to know where he got them. To see if they were stolen. Not at that time had anybody ever reported stolen goods to me. I wanted to know whether they were stolen or not for my own information, about the investigation of this case.

Q. Why did you not tell him you were investigating this case?

A. I did not tell him.

Q. Why?

A. Well, I just did not.

Q. You did not think it any of his business?

A. Well, I did not tell him.

Q. Can you tell me why you did not tell him, Mr. Gardner?

A. I did not.

Q. Tell me why?

Mr. Walker: He answered that about four times.

Mr. Bell: He has not told me why he did not tell him, that is what I am trying to get out of him now, why did you not tell him?

A. Well, I might have had a reason.

Q. Will you tell me that reason?

A. I told you I did not tell him.

Q. Well, give me the reason you might have had? Tell the jury the reason you might have had for not telling him?

A. Well, I was looking for evidence at that time, I did not tell him exactly what I was looking for.

[fol. 105] Q. Why did you not tell him that?

Mr. Walker: I object.
The Court: Sustained.

(Defendant's Exception #16)

I was present when he signed this paper writing. Detectives Hucks, Fesperman, Captain McCall, Claude Davis and myself were there in the room. All of us, I presume were armed, I was. I sure did have my pistol on. It was concealed. I believe Captain McCall had his coat off, I might have seen his pistol. I did not pay any attention. I don't remember whether any of the other officers had their coats off. No, I did not hear Captain McCall tell him to sign it. No, I did not hear Captain McCall tell him that he had already solved the matter. I heard Captain McCall tell him that if he had told Lieutenant Sykes the truth about this matter and Detective Hucks and Detective Fesperman, that he would like for him to make a statement to that effect, but that he was not, it was not compulsory that he could make it or he did not have to make it but we would like to have one if he did not mind signing a statement to that effect. I do not know why the first page was not signed. Well, it was my information that he was an escaped convict that is why he was held in jail three or four weeks without any charge preferred against him. No, not all of them are held in the Charlotte city jail. But when we pick one up we hold him. It would take me a long time to figure out any other convict held in jail that long. I don't know right off hand of any. I don't know about his being held without having the privilege of seeing or talking to anybody. There was some wording on that arrest sheet to that effect but I have not seen it. I don't know anything about it other than it is just a routine arrest sheet. I did not read it, no. I don't know the contents of it. I had not thought of it as it being important. I think maybe three or four names were on the paper when I signed it, I am not positive. I think the defendant had signed it at the time I signed it. [fol. 106] No, I am not positive, I believe he had. I would sign before he did because I heard him make the statement. I heard Captain McCall make the statement to him. I heard him state that the statement was true and I signed it to that effect. That is right, I would have signed it regardless of whether the Defendant signed it or not.

(Witness excused)

Mr. Walker: Your Honor, at this time the State rests. Defendant moves for nonsuit.

The Court: Motion denied.

(Defendant's Exception #17)

Mr. Bell: Your Honor, we would like to call Captain Yandell.

Captain John Yandell:

By Mr. Bell:

My name is John W. Yandell. I am a member of the Charlotte Police Department. I have been with the police department 27 years. I have been custodian of the records *of the records* over there for 13 years. The original arrest sheet is in Court, but I don't have it. I got it from the files of the police department. This record is the original of three copies of an arrest ticket, it is made out by the desk sergeant. One copy is made for a permanent record, the second copy is for use of the desk sergeant as long as the person stays in jail, and the third copy is used for statistical purposes. The white copy goes to the jail, so that he would have a record of who is in jail, and also that that person needs to be or is finger printed, the finger prints are put on this copy or the number. It is not a definite order of the police department to have directions to the jailer as to the circumstances under which this man is held and how he is to be held. In this case there is such a note. This copy was in my files when I brought it over here. That is an authorized file of my department.

I don't remember when Elmer Davis was brought into the police department, only from the records that show what date he was brought. I have no personal recollection. [fol. 107] No, I did not have anything to do with the investigation of this case.

Cross-examination.

By Mr. Walker:

I did not personally make up this arrest report. No Sir, I do not know anything about the facts of this case other than what I have read off of the arrest sheet, I have not even read his confession. The "PHW" was put on the arrest report after the hearing in the City Recorder's Court, I don't know what the date was. There is a date written on there in ink as to the date of the hearing in the City Recorder's Court. The PHW on that card means preliminary hearing waived. Yes, over to this Court. Yes, this was put on subsequent to the time the original sheet was typewritten out. The marking with a ball point pen at the top of the sheet I believe was put there by the identification officer. No Sir, I do not know when it was put on there. No Sir, I don't know when or by whom that was put on the card about not communicating and not using the telephone and all of that, the only thing I can tell by that is that it was put on by the typewriter used at the desk sergeant's desk. The part concerning the fact that he was not to see visitors or make telephone calls could have been put on at any time before I saw this card, I don't know when it was. That is correct, I had never read the particular arrest report before I was required to by the Court to bring it over here. No, I don't know when this was put there.

Redirect examination:

The copy would go to the jail immediately after being made out. It is made out according to the work load of the desk sergeant, if he is up with his work and has it it is made up immediately. No, they are not made out three weeks after a man is put in jail. They are usually made out the same day a man is put in jail and accompany him usually to the jail. It is sent up there so that the jailer will have a record of who is in the jail and of course what the charge is.

(Witness excused)

[fol. 108] J. W. PORTER recalled:

By Mr. Bell:

I am a member of the detective division of the Charlotte Police Department. I did go to Belmont to get Elmer Davis. Lieutenant Gilleland sent me over there. I did not ask him why he was sending me over there, he went with us. He said he was sending me over there to make an investigation. To go talk with him about some articles that he had in his possession when he was arrested in Belmont. We found him in the jail at Belmont, N. C. The Chief of Police was in charge of him. I did not talk to the Chief of Police about him before I went into the jail. He was talked to by Lieutenant Gilleland in my presence. We asked the Chief about the prisoner, what articles of clothing he had, etc., when he was arrested. We later went to the jail and saw Elmer Davis. After we got to the jail we told him that we were taking him back to Charlotte with us. We told him we were bringing him back because he was an escaped convict and we were going to make an investigation. Investigation of crimes that might have been committed due to the articles that he had in his possession. I don't recall all the conversation we had with him. We did not tell him that we were bringing him back to investigate this murder. I was with Davis when he was brought into the Charlotte Police station. I don't recall whether I made out the arrest sheet or not. He was brought in and placed in the city jail. He was carried immediately to the jail. We did not stop at the desk. When we arrest a prisoner either Mr. Holmeberg or I make out the arrest sheet and I don't recall whether I made this one out or whether Mr. Holmeberg made it out, one of the two of us made it out. If I could see the original I might could recall. I have talked to Mr. Holmeberg since this case has been in progress. We have not decided anything, he does not remember either.

I have not seen the sheet since it was made out. I don't know whether my name is on it or not. This paper writing [fol. 109] is not the original arrest envelope that we make out. Nothing on there to refresh my recollection. I make them out in longhand and if I had made it out I would be able to tell. I only know what I have read here. I don't

know anything about the contents. I don't know anything about the printed portion.

We were asked by Mr. Hucks to talk with the defendant. To the best of my recollection, he denied that he killed Mrs. Cooper one time. I don't remember the date, it was on Saturday about a day before the Tuesday that that was signed.

Q. I want you to tell me what you said to him?

Mr. Walker: The last juror is not hearing you, Mr. Porter.

A. I am sorry. We had talked with the defendant the day before with reference to the lady's panties that were found in his possession when he was arrested in Belmont.

Q. I ask you what did you say to him the day he denied it?

A. Well, I will have to lead up to it.

Q. Can't you tell me what you said to him?

Mr. Walker: I object to arguing with the witness.

Mr. Bell: I am not arguing, I just want the man to answer my questions, this is an important case and this man is being tried for his life.

The Court: Mr. Bell, you will have an opportunity, the law says you will have at least two hours to argue to the jury. I will permit you to have the full time, but I don't want you to argue your case at this time. You have got a witness on the witness stand and you can examine him.

DEFENDANT'S EXCEPTION #18

By Mr. Bell:

Q. Mr. Porter, will you tell the Court and jury what you said to this man when he denied it?

A. We asked him on Saturday if he had known what he was being held for, and he said that he did. He told us that he knew what he was being held for, the murder of Mrs. Cooper. We asked him if he was the one that had committed the murder, maybe not in those words but we asked him that question, he stated to us that his mind was a [fol. 110] little hazy on the day in question, the day the murder was committed, but denied killing Mrs. Cooper.

To the best of my recollection that was all that was said.

Q. How many times after that did he deny it to you?

A. Not any, we did not go into it any further. He asked to be carried back to the cell where he could pray and maybe reach a decision and we allowed him to do so.

Q. Did he ask you for any food?

A. He did.

Q. He did ask you for some food?

A. He did.

Q. Did you go get him some?

A. We certainly did.

Q. Did he tell you he was hungry?

A. He asked for a hot meal and we went out and got two hamburgers and a glass of milk.

Q. Did he tell you that he had been nearly on the verge of starvation?

Mr. Walker: Object.

Mr. Bell: I am asking a simple question, Your Honor.

Mr. Walker: I know and I object to it.

The Court: He is your witness and I sustain the objection.

By Mr. Bell:

Q. Did he tell you that he had not had sufficient food?

Mr. Walker: Object to the form.

The Court: Sustained.

(Defendant's Exception #9)

He said that he would like to have a hot sandwich. I do not know what kind of sandwich he had been having.

Cross-examination.

By Mr. Downs:

Yes, the arrest ticket that was made out was on an envelope about that size. Yes, Mr. Holmeberg or I wrote it [fol. 111] in our own handwriting. Yes, this sheet was prepared by somebody else. Yes, at the time other than when I was booking him downstairs. No, I did not put on the original envelope "escapee from Haywood County, still

has 15 years to go, do not allow anyone to see Davis or allow him to use the telephone". No, I do not know where this information came from that is on the copy of the envelope. No, I did not put it on there. This is the first time I knew it was on there. We asked Davis when we were talking to him if he had anyone he would like to call or see. He told us that he would. He said he did, he would like to talk with his sister, and we tried to find her telephone number for him, we did not know that Mr. Hucks and them had already contacted her. That was the day after they had gone out to locate his sister.

I first saw this article, marked State's Exhibit No. 29, in Belmont, N. C., police department. They were in the possession of the Chief of Police in their record room. We asked the defendant about the articles. He said that he had taken these panties off a clothes line somewhere in the mountains, that is with the exception of one pair which was soiled, and he had to break in a house to find the pair that was soiled, he said he did not like clean pants. (Whereupon the box marked State's Exhibit No. 29 and its contents, including a number of pairs of ladies panties and the other articles referred to hereinafter, was introduced and received in evidence.) In that box is a belt, comb, cigarette lighter and some clothes, there is another pantie. At the time we got this box from the Belmont police there was one identification that belonged to Mr. Hayes, a lady's picture and also some papers in there from someone who lived in Columbia, S. C. I brought the two hamburgers and glass of milk for the defendant on Friday before he signed the statement. At supper time around 7 o'clock when we carried them to him. Yes, they had already fed in the jail at that time. No Sir, that is not the reason for going out and buying him some food. During the first part of the interrogation, he asked if he would be allowed to go back. I did not at any time see the defendant reading a newspaper or book or magazine or other papers. I do not know whether or not Davis can read.

[fol. 112] Redirect examination.

By Mr. Bell:

I know those clothes there are ladies panties. If they are not I have been misinformed all of my life.

(Witness excused)

W. O. Holmeberg recalled:

Direct examination.

By Mr. Bell:

My name is W. O. Holmeberg. I am a member of the detective division of the Charlotte police. Yes, I went to Belmont on the 21st day of September, 1959 along with Lieutenant Gilleland and Mr. Porter. I did not receive any instructions from Captain McCall before I went to Belmont. Yes, I knew why I was going to Belmont. I found out from Lieutenant Gilleland. I did not know about Mrs. Cooper's death but what I had read in the paper and discussed in the police department prior to going to Belmont, prior to the apprehension of Davis in Belmont. We did not discuss the Cooper murder. He said we were going to Belmont to pick up an escaped convict and to interrogate him in regard to the articles he had in his possession at the time of the arrest in Belmont. Yes, I was with Lieutenant Gilleland and Mr. Porter when he was brought to the city police station. I don't recall whether Mr. Porter or me made out the arrest sheet on that arrest envelope. I have no knowledge of where the envelope is. Yes, I have tried to find out where it is. I back-tracked. Usually when a prisoner is arrested an arrest envelope is made out and it is carried to the desk sergeant's desk where three copies are made and that is kept in a file cabinet while the prisoner is in the city jail, and then when the prisoner is transferred to the Mecklenburg County jail, it is sent over here with him. I would have to see the arrest sheet to know anything about the contents, I can't answer that unless I see it. Yes, my name is on it. I did not put my name on this sheet. If I made the other sheet, every person that is at the arrest and makes the apprehension, their name is put where it

[fol. 113] says arresting officers. I can't say, I don't recall if I had anything to do with the contents of that copy of the arrest sheet. It is not our policy to put down on an arrest sheet whether this man is to be held without benefit of or without being able to see anybody or call or communicate. To my knowledge that is not the policy of the police department. It is not a policy of the police department unless it is a written order. I would say no that whoever put that down there violated the policy of the police department, it is not a violation of the city police department because I don't know of any written order that would be violating, or be violated, by putting that on an arrest sheet. To my knowledge I don't know of a written order that has been put out in the city police department.

Yes, I talked to this prisoner prior to October 6, 1959. On one occasion I talked to him in reference to the death of Mrs. Foy Bell Cooper. We talked to him in regard to the evidence that has just been presented by Mr. Porter, and the matter of Mrs. Cooper. We asked him did he know the reason why he was being held in the city jail, and he said yes, he had an idea that it was in regard to the murder of Mrs. Cooper. We asked him if he was the one and he denied it. He denied it to me just once. No, after that Saturday before he signed the statement we did not talk with him any more. Yes, I gave him food along with Mr. Porter. We gave him food because he asked us to, if we would get him some hot food and we told him yes. No, not to my knowledge did he tell me he was hungry. He asked me for food just on that one particular incident, and that was on Friday. No, I don't know what kind of food he had been getting. No, I did not try to find out. I had heard and have seen what they serve in the city jail on several occasions. They have ready made sandwiches. They serve them to all prisoners that are incarcerated in the city jail.

I would not be able to answer truthfully whether all get the same food, Mr. Bell, I don't know. I don't know what privileges some prisoners get, if they have the money they can send out and get food or people can bring food in to them. No, we did not get food for other people because [fol. 114] we were interrogating Davis alone, we were not

interrogating any other persons. This was, the date we got the food was Friday before he signed the statement. No, I did not get the food so that I could soften him up to make a confession, that was the first time we had talked to Davis. The first time that we were asked to interrogate him. No, I was not present on the morning of October 6, 1959 when he talked to Mr. Hucks or when Mr. Hucks brought him in to the detective division of the police station. No, I did not go up to the mountains with Elmer Davis and Mr. Hucks. Prior to this Court trial, I did not know Mr. Hucks had carried Davis to his house to give him a meal. No, I did not know that Mr. Hucks brought him peanuts from time to time.

Cross-examination.

By Mr. Walker:

No Sir, I did not make out this paper writing marked Exhibit 1, that is made out by the desk sergeant. No, I did not put on the brown envelope, "Hold for Hucks and Fesperman re Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis or allow him to use telephone". Yes, that is taken from an arrest envelope. The original arrest envelope carries his personal belongings if he has any. That is right, as soon as he is transferred from the city jail to the Mecklenburg County jail, that envelope accompanies him and is kept in the county jail. No, the brown envelope would not be in the Charlotte Police Department. No, not at this time. Yes, the only time I ever talked with Elmer Davis was when I was with Mr. Jack Porter. We talked to him on Friday and Saturday. No Sir, I did not mention the murder case to him on Friday. Yes, it was mentioned to him on Saturday for the first time.

By Mr. Bell:

I know where it is with an explanation, after it was turned over to the desk sergeant by Mr. Porter and me, I would have no knowledge of where it is. I would say no, I don't know if it has anything on it, the original arrest [fol. 115] sheet, in reference to holding him incommunicado. I have no knowledge of when he was transferred

to Mecklenburg County jail. No, I was not in the cell or in the police department when Mr. Hucks told him to waive preliminary hearing. No, I do not remember when the preliminary hearing was waived.

(Witness excused)

BISHEL BUREN HAYES recalled:

By Mr. Bell:

Yes, we went along the railroad tracks, on the left hand side of the tracks near the cemetery. We went out in the bushes and drank the pint of whiskey, sat down. I would say we drank it in about thirty or thirty-five minutes. No, I did not tell Mr. Diamond to go to the whiskey store, I told him to go up there to the bootlegger that he knew and get a pint. We both went in together and bought it. A pint of whiskey costs $4.00 and I paid two dollars. I do work and I have got money for work. I got the two dollars from the man where I was working in Spartanburg at the Royal Cafe. I was the grill man there, cooking on the grill, short orders. I was on the first shift. No, I am not in jail resting, I am just staying here at night because I did not have any place to stay here in Charlotte. I stay up there in the county jail. Yes, I have eaten up there. They serve just ordinary meals like sweet potatoes and beans and corn bread, of a morning they give grits and gravy and meat or some kind of sausage and coffee with cream in it.

I have been in the city jail three times, I think. I was charged for drunkenness. Yes, for each time. Yes, I did eat over there. They gave me sandwiches and if they had more sandwiches left, they would come back around and if anybody else wanted another sandwich he would have got it, I had four sandwiches over there one time at one meal. The smallest amount that I got over there would be two sandwiches. The largest I think four sandwiches a day. I think the law required four sandwiches a day over there, the city law. I have been in jail three times, I should know [fol. 116] the law. No, I did not request any hot food in the city jail, because they served sandwiches and they give coffee and I thought that was enough, and they come back around if they had any left and gave me more so they

did not get hot food so I did not think I should insult anybody by asking for hot food when all the rest of them were getting sandwiches like I did.

I drink whiskey anywhere I want to when I buy it, it is mine, I drink it where I want to. I was out there at the cemetery at that time, yes. Elmwood Cemetery is across the railroad, and from where I was at I will say it is 50 or 75 feet across from where I was at to anywhere you could go in the cemetery. I laid down in the bushes I would say around probably five minutes to or maybe 5 o'clock in the evening. When I woke up was when I go up to the Salvation Army around 9:30 or 10 o'clock, I don't recall because I walked up there barefooted in them weeds and it was not a good feeling so I did not exactly look for the time, I was looking for a pair of shoes. Yes, I was under the influence of whiskey when I went out there. After I consumed the pint I was intoxicated with whiskey and I laid down and went to sleep. I know I laid down and went to sleep, I knew I was too drunk to be out on the street walking.

I am spending the night up here in the county jail. I suppose the sheriff of Mecklenburg County allowed me to. No, I did not ask him. Arrangements was made for me to spend the night because I had no place to stay while I was here, and I am a sick man. I don't know who made the arrangements.

Mr. Walker: I will be glad to tell you, I made it, the arrangements so that he could stay here.

By Mr. Bell:

No, I did not ask Mr. Walker to make arrangements for me. No, I did not talk about this case to Mr. Walker before this morning. I have never seen him to my knowledge before this morning. I did not talk to anybody about it, the man came to me and told me did I have any place to stay and I said I did not, I was talking to Mr. Hucks, and [fol. 117] I told Mr. Hucks, I said, "Mr. Hucks, I don't have any place to stay and I don't have any money with me to buy a room and meals while I am here", and he said, "I will see if I can get you a place to stay." I do not know that Mr. Hucks did after that because I did not go with him. Yes, I saw Mr. Hucks again. He came to me

where I was sitting in that second or either the third chair there, if I am not mistaken, he came to me and said, "I have made arrangements for you to stay in the county jail." I am going to stay there until they are through with me here. From here I go back to Hendersonville to my aunt's and uncle's where I came from. I hitchhiked up here from Hendersonville.

Cross-examination.

By Mr. Downs:

I was 50 or 75 feet from the Elmwood Cemetery, from where I was at I believe it was 6th Street entrance I think I was on. I believe it is 6th Street that I went down where I turned down to go into these bushes, I believe it was 6th Street, I am not positive but I believe it was 6th Street.

(Witness excused)

Defendant Rests.

Mr. Bell: Your Honor, we would like to renew our motion for judgment as of nonsuit.

Mr. Walker: We will call one more witness.

Rev. J. S. Nathaniel Tross testified as follows:

Direct examination.

By Mr. Walker:

My name is J. S. Nathaniel Tross. Yes, I have a doctor's certificate in philosophy and theology. I am pastor in Charlotte, N. C. and publish the Charlotte Post, a newspaper. Yes, Sir, I have a radio program over WBT. The nature of my program is interracial relations and interracial good will. The name of my church is China Grove A. M. E. Zion Church. I have lived in Charlotte, N. C. since 1932.

[fol. 118] Yes Sir, I had occasion to talk with the Defendant, Elmer Davis, Jr., on the evening of October 6, 1959. I talked with him in the office of Captain McCall. It was between 10 and 11 o'clock in the morning. I do not definitely recall the date of the week but it must have been

sometime the first part of the week. Yes, it was the day following the purported confession. Yes, that would be October 7, 1959. I had the usual conversation with him as I have of my visitation to the prisoners. I have a conversation with respect to his spiritual status, and whether or not he desired any spiritual help from me and matters of that kind. (Whereupon the jury was excused, and Dr. Tross examined concerning whether or not Dr. Tross' statements were privileged communications.) After hearing all of the testimony in this regard, the Court ruled: "Then I will require that you answer the question."

I did not discuss the crime at all with him. I discussed, that is the first question I asked him were the officers taking good care of him and his answer was yes. I asked him specifically about having not been fed properly and he said he was well taken care of. I did not ask him whether or not the statement that he gave to the police was true, I asked him whether he believed in the prayer that Lieutenant Sykes made for him and he said, "Yes." I asked him if he needed more prayer and needed my assistance, and then we went into a spiritual side of it. Yes, he told me Lieutenant Sykes prayed with him, and I asked him if he enjoyed it and if he had faith in it, and he said, "Yes." I asked him if he could pray, and he said "No", and I asked him if he wanted me to pray for him and he said "Yes", and I prayed with him. In my opinion he knew what he was saying when he talked to me. I am a Negro. He said nothing about a written statement. We did not discuss that. No, he did not speak of any verbal statement that he had made to the officers, he only spoke of his interest in what Mr. Sykes said.

Cross-examination.

By Mr. Nivens:

Yes Sir, I was at one time the pastor of this Defendant's church to which he and his family belonged to in Belmont. I don't know when he became disconnected with the church, but I know he was a boy. He must have been about 8 or 9 [fols. 119-132] years old. I don't think the boy was very bright. He has never appeared to me to be particularly normal in his youth. His environment, he came from a

religious background, very religious aunt, his aunt. I think he was living with his aunt at the time I knew him. I am not sure. No, he was not with the father and mother. No, he was never very much in school.

Redirect examination.

At the time I talked to the defendant, I was closeted in Lieutenant or Captain McCall's office. Nobody else was there. Yes, I talked to him alone. I talked to him the entire hour. When I got through, Captain McCall told me when I was through talking with him I could notify him and he brought him in from his cell and when I got through I notified him. I asked Captain McCall could I talk with the Defendant. I was treated with extreme courtesy. We were locked in Captain McCall's office.

(Witness excused)

After Court rendered judgment Mr. Bell, one of the counsels for the defendant, made the following motion.

Mr. Bell: At this time we want to make a motion to set this Judgment aside as being against and in violation of the Fourteenth Amendment to the Constitution and due process of the Fourteenth Amendment to the Constitution of the United States.

The Court: Motion denied, exception.

[fol. 132a] IN THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

PETITIONER'S EXHIBIT NO. 1

Last Name	First Name	Initials	Aliases and place of birth	Arrest N
Davis	Elmer	Junior		8515

Residence	Sex	Color	Age	Comp.	Hair	Eye
	M	C	29	Choc	Blk	Brow

Cell	Time of Arrest	Date	Complainant
92	11:00 P.M	9-21-59	

Charge	Place of Arrest	Arresting Officers
Hold	Belmont Police Dept.	W. O. Holmburg Lt. Gilleland & J. W. Porter

Facts of the Arrest — Names of Prosecuting Witnesses

Hold for Hucks & Fesperman Re-Mrs. Cooper. Escapee from Haywood County still ha years to pull. Do not allow anyone to see Davis. Or allow him to use telephone

Released on $ Bond by at M 19

Final Disposition

Found: Guilty / Not Guilty as charged — Fine $_____ Cost $_____ Date_____ 19

Sentence: Months_____ Days_____ Docket No._____

Judge: Other Disposition

Desk Officer: HLR Nothing

Charlotte Police Department

Arrest Record

Fingerprint No.

Last Name	First Name	Initials	Aliases and place of birth	Arrest N
R Davis	Elmer	Junior	Gaston Co. 7-28-27	P 851

Residence	Sex	Color	Age	Comp.	Hair	Eye
None	M	C	32	Choc.	Blk	Brow

Cell	Time of Arrest	Date	Complainant
92	11:00 PM	9-21-59	W. F. Hucks

Charge	Place of Arrest	Arresting Officers
Murder & Rape	Belmont Police Dept.	W. O. Holmburg Lt. Gilleland & J. W. Porter

Facts of the Arrest — Names of Prosecuting Witnesses

Did kill and slay one Foy Bell Cooper on Sept. 20th in Elmwood Cemetery

Released on $ Bond by at M 19

Final Disposition

Found: Guilty / Not Guilty as charged — Fine $_____ Cost $_____ Date 10-7 19

Sentence: Months_____ Days_____ Docket No. 10014

Judge: Other Disposition PHW Bound over to Superior Court—No Bond

Desk Officer: HLR Nothing

Charlotte Police Department

Arrest Record

Fingerprint No. 15609

(Defendant's Exception #21)

[fol. 133] Assignments of Error

The defendant assigns the following errors:

(1) That the court erred in ruling that the statement made by the defendant to Lieutenant C. L. Sykes in the City of Charlotte police department, was made voluntarily:

By Mr. Walker:

Tell what your conversation with with the Defendant?
Mr. Bell: Object to that.
Court: Overruled.

(Defendant's Exception 1) (R p 13)

(2) That the court erred in lodging an objection ex mero motu to the questions propounded by the defense attorney to Chief of Police, Jesse James, as irrelevant to the issue of voluntariness of the confession when he (defense attorney) asked, "Are you familiar with General Statute 15-47"? and the Court asked, "What difference does it make whether he is familiar with that statute or not"?)

(Defendant's Exception 2) R p 25 and 26)

(3) That the court erred in making the following statement in the absence of the jury when counsel for defense stated the following:

(Mr. Bell: We are showing the circumstances that it could not be voluntary.

Court: I don't know whether you are or not. You have done a lot of hollering but I have not heard much evidences, chasing rabbits all over Mecklenburg County.)

(Defendant's Exception 3) (R p 28)

(4) That the court erred in objecting ex mero motu to the following question propounded by the defense attorney to Captain McCall when he asked the following question:

(Q. Don't you know yourself you are not suppose to hold a man for an unlimited time without appriging him of why he is being incarcerated?

[fol. 134] A. He knew why he was being incarcerated.

Court: Objection sustained.)

(Defendant's Exception 4) (R p 33)

(5) That the court erred in ruling that the statement made by the defendant to Lieutenant C. L. Sykes in the City of Charlotte police department, was made voluntarily:

(Court: Any further evidence for the defendant?

Mr. Bell: Your Honor, that is all the defendant has . . .

Court: Any further evidence for the State on this point?

Mr. Walker: No.

Court: Let the record show that the Court at this time rules that the statement made by the defendant to Lieutenant C. L. Sykes in the City of Charlotte police department, was made voluntarily and such statement is admitted in evidence as shown by the written record. To the ruling of the Court, the defendant objects to the purported conversation in answer to the questions previously asked the witness, C. L. Sykes, and as shown by the record. The defendant in apt time objects and excepts.)

(Defendant's Exception 5) (R p 44)

(6) That the court erred in allowing the purported signed statement of Elmer Davis, Jr. to be offered in evidence and read to the jury:

(Mr. Walker: I want the jury either to read it themselves or for someone to read it aloud. It will be quicker to read it aloud. First of all I would like to make a motion that this statement be introduced as State Exhibit No. 10.

Mr. Bell: Object.

Court: Overruled. The statement being in evidence, Mr. Solicitor you may read it.)

(Defendant's Exception 6) (R p 50, 51, 52)

(7) That the court erred in permitting the Solicitor to propound the following question to its witness, Lieutenant Sykes, and eliciting the following answer over objection of [fol. 135] counsel for the defendant:

(Q. Do you have any other position in the church?

Mr. Bell: Object to all of this and move to strike.
Court: Overruled, exception.

A. I have been appointed by the District Superintendent as a Methodist Lay speaker.

Q. What does that mean? For some who might be Baptists?

Mr. Bell: Object.

Court: Overruled.

A. That only means that I go as a speaker for the Methodist Church throughout this district, Methodist Conference, to speak on Sunday in churches that do not have a regular pastor.)

(Defendant's Exception 7) (R p 54)

(8) That the court erred in sustaining State's objection to the following question propounded to Lieutenant Sykes on cross examination by the defendant:

(Q. Don't you know that a man who has been put in jail is supposed to be apprised of what charge is against him in twelve hours, don't you know that the statute requires that?

Mr. Walker: Object to that question on the law.
Court: Sustained.)

(Defendant's Exception 8) (R p 57)

(9) That the court committed error in overruling the defendant's objection to the following questions and overruling the defendant's motion to strike:

By Mr. Walker:

Q. Do you know what this is on the back side of these panties?

Mr. Bell: Object.

Court: If he knows, objection overruled.

A. It is secretion.

Q. Excretion?

A. Yes.

Q. Is that what it is?
A. Yes.

[fol. 136] Mr. Nivens: If the Court please, I object and would like to be heard, and move to strike.
Court: Motion to strike denied.

(Defendant's Exception 9) (R p 69)

(10) That the court erred in reprimanding defendant's counsel before the jury in contravention to GS 1-180 by making the following statement to defendant's counsel while cross examining the State's witness, Captain McCall:

(Q. You could have printed that page two weeks after you put him in Mecklenburg County jail, could you?
A. Yes, sure I could but any time that I have got to do that for any defendant, that is when I will turn in my badge and quit the Charlotte Police Department.

Court: Just a minute, you sit back down there and quit interrupting the witness while he is answering the question that you have asked him. I can assure you that we will get along with the trial. Now then, if you will let the witness complete the answer to the question that was asked, does that complete your answer?

A. Yes.)

(Defendant's Exception 10) (R p 94)

(11) That the court erred in reprimanding defendant's counsel before the jury in contravention to GS 1-180 by making the following statement to defendant's counsel while cross examining the State's witness, Captain McCall:

(Q. So Lieutenant Sykes does not know what he is talking about, does he?

Mr. Walker: Object.
Court: Sustained.

A. The Defendant——

Mr. Walker: You don't have to answer that.

A. I never did get to finish the first question.

By Mr. Bell:

[fol. 137] Q. I say Lieutenant Sykes did not know whether he signed——

Court: I sustained the objection to that question, and direct you again to have a seat and ask your questions from a sitting position.

Mr. Bell: Your Honor——

Court: We are not in Recorder's Court, we are trying a man as you have pointed out several times during this trial for his life, we have not got and we are not having a Roman circus.)

(Defendant's Exception 11) (R p 95)

(12) That the court erred in sustaining the State's objection to the following question propounded to the State's witness, Captain McCall, on cross examination:

By Mr. Bell:

(Q. Captain, don't you know that the law compels you to charge a man with a crime if you put him in jail within twelve hours?

Mr. Walker: Object.

Court: Sustained.)

(Defendant's Exception 12) (R p 97)

(13) That the court erred in refusing to strike the following answer of State's witness, Captain McCall, when the following questions were propounded to him by counsel for the defense:

(Q. Why did you not bring someone else in there at the time he was going to confess?

A. Well, Mr. Bell, we are not in the habit of bringing outsiders and attorneys in when a confession is made.

Q. You did not think it was that important?

A. Well, if you jurors or the Court don't believe what the six officers or five officers and myself have to say about this case, all I can do, we have presented the case as fairly

and squarely and presented the evidence to the Court as we obtained it, without promise, threats, duress or anything.

[fol. 138] Mr. Bell: I move to strike that as not responsive.
Court: Motion denied.)

(Defendant's Exception 13) (R p 100)

(14) The court erred in sustaining the State's objection to the following question propounded by counsel for the defense on cross examination of Captain McCall:

(Q. Have you ever read General Statute 15-47?

Mr. Walker: Object.
Court: Sustained.)

(Defendant's Exception 14) (R p 101)

(15) That the court erred in sustaining the State's objection to the following question propounded by counsel for the defense on cross examination of Captain McCall:

By Mr. Bell:

(Q. Do you know the requirement of the State in reference to keeping prisoners without charging them with any crime?

Mr. Walker: Object.
Court: Sustained.)

(Defendant's Exception 15) (R p 101)

(16) That the court erred in sustaining the State's objection to the following questions propounded by counsel for the defense on cross examination of Detective Homer Gardner and in not requiring the witness to answer the questions propounded by counsel for the defense:

Q. Why did you not tell him you were investigating this case?
A. I did not tell him.
Q. Why?
A. Well, I just did not.
Q. You did not think it any of his business?
A. Well, I did not tell him.

Q. Can you tell me why you did not tell him, Mr. Gardner?
[fol. 139] A. I did not.
Q. Tell me why?

Mr. Walker: He answered that about four times.
Mr. Bell: He has not told me why he did not tell him, that is what I am trying to get out of him now, why did you not tell him?

A. Well, I might have had a reason.
Q. Will you tell me that reason?
A. I told you I did not tell him.
Q. Well, give me the reason you might have had? Tell the jury the reason you might have had for not telling him?
A. Well, I was looking for evidence at that time, I did not tell him exactly what I was looking for.
Q. Why did you not tell him that?

Mr. Walker: Object.
Court: Sustained.

(Defendant's Exception 16) (R p 104 and 105)

(17) That the court erred in overruling the defendant's motion for judgment of nonsuit:

(Mr. Walker: Your Honor, at this time the State rests. Defendant moves for nonsuit.
Court: Motion denied.)

(Defendant's Exception 17) (R p 106)

(18) That the court erred in making the following statement before the jury when this conversation ensued between the Solicitor and the Counsel for the defense:

(Mr. Walker: I object to arguing with the witness.
Mr. Bell: I am not arguing, I just want the man to answer my questions, this is an important case and this man is being tried for his life.
Court: Mr. Bell, you will have an opportunity, the law says you will have at least two hours to argue to the jury. I will permit you to have the full time, but I don't want you [fol. 140] to argue your case at this time. You have got a witness on the witness stand and you can examine him.)

(Defendant's Exception 19) (R p 109)

(19) That the court erred in sustaining the State's objection to the following question propounded by counsel for the defense to Mr. Porter on direct examination:

By Mr. Bell:

Q. Did he tell you that he had been nearly on the verge of starvation?

Mr. Walker: Object.
Mr. Bell: I am asking a simple question, Your Honor.
Mr. Walker: I know and I object to it.
Court: He is your witness and I sustain the objection.

Q. Did he tell you that he had not had sufficient food?

Mr. Walker: Object to the form.
Court: Sustained.)

(Defendant's Exception 19) (R p 110)

(20) That the court committed error in refusing to give the following prayer for instruction as requested by the defendant:

(If the evidence produced in the trial of this case has proven to you beyond a reasonable doubt that the defendant murdered the deceased in the perpetration of a felony "Crime Against Nature" and has failed to prove to you beyond a reasonable doubt that the deceased was murdered by the defendant in the perpetration of a felony "Rape", then it would be your duty to return a verdict of Not Guilty.)

(Defendant's Exception 20) (R p "G")

(21) That the court erred in refusing the defendant's motion to set aside the judgment as being against and in violation of the Fourteenth Amendment to the Constitution of the United States and the due process clause thereof:

(After Court rendered judgment Mr. Bell, one of the counsels for the defendant, made the following motion. [fols. 141-142] Mr. Bell: At this time we want to make a motion to set this judgment aside as being against and

in violation of the Fourteenth Amendment to the Constitution and due process of the Fourteenth Amendment to the Constitution of the United States.

Court: Motion denied, exception.)

(DEFENDANT'S EXCEPTION 21) (R p 119)

(22) The defendant excepts to His Honor's charge because he failed to declare and explain the law arising on the evidence given in the case in that he failed to charge the jury that in reaching their verdict they were not to consider the evidence elicited to the effect that the defendant killed the deceased in the perpetration of the felony "Crime Against Nature"—in contravention to G. S. 1-180.

(DEFENDANT'S EXCEPTION 22) (R p 120-132)

[fol. 143] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8453

ELMER DAVIS, JR., Appellant,

versus

STATE OF NORTH CAROLINA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. ALGERNON L. BUTLER, DISTRICT JUDGE.

Reargued June 7, 1962

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

W. B. Nivens and Charles V. Bell for Appellant, and Harry W. McGalliard, Assistant Attorney General of North Carolina, (T. W. Bruton, Attorney General of North Carolina, on brief) for Appellee.

[fol. 144] OPINION—November 7, 1962

SOBELOFF, Chief Judge:

No task is more unwelcome to a federal court that that of determining whether a constitutional infirmity exists in a particular state criminal proceeding. However, when an issue of federal law is raised in a state trial, it may later become our duty to undertake such a review. The question in the present case is whether the District Court erred in dismissing a petition for a writ of habeas corpus filed by a state prisoner without conducting a hearing.

On December 18, 1959, the Superior Court of Mecklenburg County, North Carolina, sentenced Elmer Davis, Jr., to death in the gas chamber for the rape-murder of Mrs. Foy Bell Cooper. The Supreme Court of North Carolina affirmed. State v. Davis, 253 N. C. 86, 116 S. E. 2d 365 (1960). Certiorari was denied by the Supreme Court of the

United States, 365 U.S. 855 (1961). The present proceedings were then begun by the filing of a petition for a writ of habeas corpus under 28 U.S.C.A. § 2241 in the United States District Court for the Eastern District of North Carolina. After the petition was denied without a hearing, an appeal in forma pauperis was permitted and a certificate of probable cause was issued by the District Court.

The gist of the petitioner's complaint is that an illegally obtained confession was utilized by the State at his trial.[1] [fol. 145] Confining ourselves at this point to the undisputed evidence in the State record, the following appears:

Between 2:00 and 3:00 p.m., Sunday afternoon, September 20, 1959, Foy Bell Cooper, an elderly woman, left her home for a visit to her mother's grave two blocks away in the Elmwood Cemetery, Charlotte, North Carolina. About 4:30 that afternoon her lifeless body was discovered by a group of young boys playing at the cemetery. An autopsy disclosed that death had been by strangulation; also, that the victim may have been raped. A few hours later Elmer Davis, an escaped convict under sentence of seventeen to twenty-five years for robbery and assault with intent to rape, was arrested by the local authorities of Belmont, North Carolina, about twelve miles from Charlotte. The following day, Davis was taken to Charlotte and placed in City Jail, customarily used for overnight detention only. A specific notation was made on the arrest sheet: "Do not

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[1] Appellant briefed and argued a second point. It is that the trial court erroneously declined to instruct the jury that in order to find the accused guilty they must be satisfied beyond a reasonable doubt that the murder was committed in the perpetration of rape. It appears, however, that the trial court did charge the jury, "If you are satisfied from this evidence and beyond a reasonable doubt that the defendant on September 20, 1959, while perpetrating the crime of rape, as that term has been defined to you, upon one Mrs. Foy Bell Cooper, the defendant caused her death, then it would be your duty to return a verdict of guilty." The difference between the instruction requested and that given is not constitutionally significant, and this point will not be further considered. Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960).

allow anyone to see Davis, or allow him to use (sic) telephone." During the next sixteen days, Davis was questioned by an undetermined number of officers, (twenty-nine had been assigned to the Cooper case), about the murder and about other felonies thought possibly to have been committed by him since his escape. The primary purpose was to check out and break down, if possible, any alibi Davis might have for the afternoon of September 20.

Then on October 6 Davis was taken to police headquarters. What occurred there is in dispute. The police version is that after Davis and a police officer "prayed together,"[2] he signed a paper confessing the rape and murder of Mrs. Cooper, and that he then took the officers to the [fol. 146] cemetery and re-enacted the crime. In any event, on returning to headquarters from the cemetery Davis was formally charged with the offense and bound over. Later, in a conversation with his church pastor, Davis stated that he had been properly fed and well taken care of during his confinement. It is undisputed on the record, however, that Davis was fed two sandwiches twice a day—he says sometimes one—and was permitted to bathe once during that time.

At trial, Davis' counsel objected to the introduction of the confession into evidence. In accordance with the State practice, the trial judge excused the jury and took testimony on the voluntariness of the confession. See State v. Rogers, 233 N.C. 390, 64 S.E. 2d 572 (1951). According to the transcript, which recites the testimony, not verbatim, but in narrative form, Davis denied making any admission of guilt to the officers or re-enacting the crime for them. He said he was told, "Davis, go in there and sign that paper so you can go to the county jail and get something to eat and get a hot bath," and that when he signed he "did not think [he] was confessing to any crime." He contended that he is illiterate and the whole document was not read to him before he signed it. He testified that he did sign some paper, which was read to him, after a police officer told him, "I determined to fram the hell out of you if you don't

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[2] For a revealing discussion of the dubious use of religious leverage to induce confessions see, Kruse, The Role of the Clergyman in the Coerced Confession, Washburn L. J., Winter, 1961.

tell me something," and that he was in fear for his life. He insisted, however, that what was read to him was not represented to relate to any murder. Later, to substantiate this claim, it was pointed out on behalf of Davis that his signature was affixed only to the second page of the two page confession, and that this page contained no mention of the rape-murder.

As to the treatment he received while at the City Jail [fol. 147] Davis testified: "I told them I would like to get something to eat, and call my sister so she could bring me something to eat, and they put me way upstairs in a room off by myself where nobody could come up there and see me. * * * During the course of these three weeks, two more detectives talked to me. They would talk to me sometimes twice a day [about the murder]. * * * [T]hey talked to me every day from the time I got there until I signed this paper." Davis also testified that he lost 15 pounds on the food provided him at the jail. Also, he asserted that the police did not inform him of his constitutional rights.

In rebuttal, police officers asserted that the whole confession had been read to Davis, and that no one told Davis he would "fram" him if he did not sign. Also, State's witnesses offered to refute the arrest sheet directive to hold the prisoner incommunicado. One related that Davis had asked to see his sister, and that he (the witness) had tracked her down and conveyed the message. The witness did not recall, however, whether she actually visited the prisoner before he confessed. Four officers admitted interrogating him several times between September 21 and October 2. They did not specify the length and manner of the questioning. The officers did not dispute the entry on the arrest sheet that Davis was being held as a suspect in the Cooper case, but they denied asking him questions about the murder at any time between September 21 and October 2. In addition, they stated that no other person had ever been kept for as long as sixteen days in their overnight jail which lacked kitchen and other facilities usually considered necessary for long detentions. No explanation was offered for confining him there instead of the regular jail located just across the street, which is customarily used when an arrested person is to be held more than a few hours.

[fol. 148] At the close of the testimony, the trial judge ruled: "Let the record show that the Court at this time

rules that the statement made by the defendant to Lieutenant C. L. Sykes in the City of Charlotte police department, was made voluntarily and such statement is admitted in evidence, as shown by the written record." The judge made no other findings of fact.

In affirming the trial court's ruling, the Supreme Court of North Carolina said: "According to our practice the question whether a confession is voluntary is determined in a preliminary inquiry before the trial judge. He hears the evidence, observes the demeanor of the witnesses, and resolves the question. The appellate court must accept the determination if it is supported by competent evidence." 116 S.E. 2d 370. To show such support, the court recited: "The officers testified the prisoner had not been mistreated in any way; that he had the same food as other prisoners [in the overnight jail]; that he did not ask to see or communicate with any person except his sister. This request was granted. On the day after the confession the prisoner told Dr. Tross, his former pastor—a member of his own race—that he had been well treated by the officers." *Ibid.* The appellate court did not undertake to make independent findings of basic facts, but pointed to evidence that would support findings by the trial judge.

The question in the present case is whether the above furnish a sufficient basis upon which the District Court could decide without a hearing whether the confession in question was obtained within the bounds of due process. This appeal brings us to the inquiry, in what circumstances may federal district courts rely upon the State record and [fol. 149] adjudicate the constitutional claim presented without conducting a hearing.[8]

The guideline is laid down by the Court in Brown v. Allen, 344 U.S. 443, 463 (1963), where it is said that the writ may be refused without a hearing only "* * * if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion." Mr. Justice Frankfurter, in his concurring opinion, amplified

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[8] The State does not contend, nor could it, that the District Court is not required to make an independent legal conclusion of the constitutional claim present. See, e. g., Reck v. Pate, 367 U.S. 433, 435 (1961).

this portion of the majority opinion. According to his exposition, concurred in by a majority of the justices,[4] if the State court has held a hearing and rendered a decision based upon "specific findings of fact" the federal judge need not rehear the facts. Id. at 504. But, "* * * if the record * * * is found inadequate to show how the State court decided the relevant historical facts, the District Court shall use appropriate procedures, including a hearing if necessary, to decide the issue." Id. at 503. We take this to mean that the federal judge may rely upon the state record where the historical facts are not in dispute, or, if there is a dispute, where the State court has resolved the factual conflict.

The question is not a new one in the Fourth Circuit. A case directly in point is Holly v. Smyth, 280 F.2d 536 (4th Cir. 1960), where there had been a hearing in the State court, but the conflicting historical facts had not been resolved. We determined, in accordance with Brown v. Allen, that it was error for the District Court to deny a hearing [fol. 150] since the unadjudicated factual allegations raised a substantial constitutional issue. We stated: "[I]f the State Court record and findings disclosed that there has been a fair and satisfactory consideration of the facts, the federal court need not have a rehearing on the same facts. The record here is totally deficient in this respect; we are not told what evidence was considered or what factual findings were made. Hence the District Court could not evaluate the State Court's factual conclusions or treat them as a discretionary ground for denying the petitioner a hearing." 280 F.2d at 543.

Likewise, in Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960), consistent with Brown v. Allen, we said that the District Court must conduct a hearing to resolve conflicts in the historical facts unless there was a "plain showing that there had been a full, fair and satisfactory adjudication of the issue in the state court." 283 F.2d at 802. In that case, however, there was no significant issue of fact bearing upon the constitutional claim. We pointed this out in upholding the denial of a plenary hearing.

To the same effect are our holdings in Clark v. Warden, 293 F.2d 479, 481 (4th Cir. 1961); Player v. Steiner, 292

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[4] Justices Black, Douglas, Clark and Burton joined in this portion of Justice Frankfurter's opinion.

F.2d 1, 2 ((4th Cir. 1961); Bolling v. Smyth, 281 F.2d 192 (4th Cir. 1960). Accord: United States ex rel Sileo v. Martin, 269 F.2d 586, 591 (2d Cir. 1959), where the court said, "Faced with such a situation, [where the factual basis of a trier's decision is obscure], the federal district court need not speculate as to the basis of decision in the state courts, but should itself proceed to a determination of the facts so that the federal question may be resolved."

The practice of appellate courts in confession cases is to [fol. 151] consider only the undisputed facts and the facts in favor of the state in determining the issue of voluntariness, where no specific findings have been made by the trier. See, e.g. Culombe v. Connecticut, 367 U.S. 568, 604 (1961). However, this is because appellate courts, unlike the district courts, have no facilities for conducting factual inquiries, and we do not think that this practice must be adhered to by the district courts. Thomas v. Arizona, 356 U.S. 390, 402-03 (1958), does not hold otherwise. There the Court merely restated the usual appellate practice above outlined. True, in that case an issue of fact had been left unresolved by the state's determination of voluntariness, and the Court did deem it not an abuse of discretion for the District Court not to hold a hearing to adjudicate the issue, but this conclusion was reached apparently because the issue of fact was not a particularly significant one under the circumstances.

In the present case, the unresolved issues of fact raise a substantial challenge to the validity of the confession. To summarize, Davis alleges that he was held in communicado, isolated from counsel, friend or family, in a small room at the City Jail for sixteen days;[5] that he was questioned daily, sometimes twice a day;[6] that he was inadequately fed;[7] and

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[5] The undisputed length of detention exceeds that in Turner v. Pennsylvania, 338 U.S. 62 (1949) (four nights and five days); or Fikes v. Alabama, 352 U.S. 191 (1957) (five nights and five days); or Reck v. Pate, 367 U.S. 433 (1961) (three nights and four days); or Culombe v. Connecticut, 367 U.S. 568 (1961) (four nights and five days).

[6] Protracted interrogation has been a basis of decision in numerous Supreme Court cases. See, e.g., Turner v. Pennsylvania, supra, note 5.

[7] Inadequate feeding of a prisoner was a basis of decision

that he was not informed of his constitutional rights.[8] While [fol. 152] no mention is made of police brutality, we have been told that "the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1961). The question to be determined is whether Davis' will was overborne to obtain the confession. See Reck v. Pate, 367 U.S. 433, 440 (1961). And its probable truth can shed no light on this issue. See Rogers v. Richmond, 365 U.S. 534 (1961).

The State argues that, as Davis was under sentence, his detention was not illegal. The point made on behalf of the prisoner, however, is not the illegality of the detention per se, and at all events we would not concern ourselves with this feature in a state case. Compare McNabb v. United States, 318 U.S. 332 (1943). Davis' contention is that had he been kept in a regular jail, given normal food rations, permitted customary access of relatives, friends and counsel, the fact that he was under sentence might have been sufficient basis for the State's argument to overcome any adverse inference. He makes allegations here of the presence of factors, unusual if not unprecedentd in dealing with sentenced prisoners, which tend to offset the explanation offered.

We do not express any opinion as to the ultimate resolution to be made of the petitioner's claim; however, we think that he has alleged enough to entitle him to a hearing. The District Court should reach its conclusions only after considering the evidence offered at the hearing as well as the State record.

Reversed and remanded.

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in Payne v. Arkansas, 356 U.S. 560 (1958). See also, Reck v. Pate, supra, note 5.

[8] See, e.g., Gallegos v. Colorado, U.S. (1962).

[fol. 153] HAYNSWORTH, Circuit Judge, dissenting:

We move in a delicate area involving the relations between state and federal courts. Immediately involved is the respect which should be accorded and the finality which may be attributed to the finding of the state courts that a confession received in evidence in the state trial court was voluntary. The importance of the resolution of the question to the administration of justice in dual judicial systems far outweighs the effect of the decision upon this state prisoner. Because it is important and because the majority opinion seems to me to broaden unduly the habeas corpus jurisdiction, I feel compelled to record my dissent from the views of my brothers.

When this matter came before the District Court, it did not, as it might have done, accept without re-examination the factual determinations of the state courts. It examined and appraised the testimony taken in the week-long murder trial. It concluded, "[a]fter a consideration of the facts of this case," that Davis had not shown the confession to have been involuntary.[1] This court reverses on the ground that a plenary hearing should have been held, and it now orders the District Court to hold such a hearing and to receive and consider any evidence that may be then offered.

This it does despite the fact that Davis sought no such hearing of the District Court. He seeks none now. He stood upon the state court record, which the District Court fully and carefully considered. He stands upon it here. He does not suggest that he wishes to offer, or that he could offer, anything in supplementation of it. He does not contend [fol. 154] that the District Court should hear the witnesses who previously testified in the murder trial, as this court now directs.

If the reversal and remand serve any purpose, other than the purpose of delay, it must be understood to command a fully blown trial *de novo* of the crucial and principal factual issue in the state court murder trial. So far as now appears, at that retrial substantially the same testimony will be presented by the same witnesses who testified in the state proceeding.

Whatever its effect, reversal seems to me to run counter

[1] Davis v. North Carolina, E.D.N.C., 196 F. Supp. 488, 493.

to two important principles. The first is that a fair determination in the state courts of a fully litigated factual issue may be accepted as conclusive in the District Court when the same issue is tendered on a petition for a writ of habeas corpus. The second is that, in such a case, if the District Court reconsiders the factual issues and makes independent findings, it usually should limit its consideration to the evidence adduced in the state court if a transcript of that evidence has been filed with it or is readily available.[2]

Admissibility of the Davis confession turned upon factual questions. The facts were sharply in dispute.

Davis testified, in the absence of the jury, that he confessed to nothing. He said he was threatened with a beating. Carried to the cemetery where this brutal[3] rape-murder of [fol. 155] an elderly woman occurred, the officers pointed out things to him, but he told them of nothing, for he had not committed the crime. He did admit that he had led the officers to a place nearby where he had hidden his prison shoes after stealing others. Later, he testified, an innocuous statement was read to him and he was told to sign it. He signed it, because he was afraid and hungry, and because he was promised food and a bath if he did sign the nonincriminating statement. He admitted his signature on the second page of the written confession, but denied that all of that page had been read to him. He did not read it himself, for he could not read.

The testimony of the officers was quite contradictory of Davis. There were no threats. There were no promises. Davis, fully informed of his rights, freely confessed to one of the officers. In the cemetery with several of the officers, he re-enacted the crime and led them to the places where he had concealed his prison shoes and other clothing. Later, he listened attentively and commented frequently as one of the officers dictated a confession. When the stenographer's

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[2] Brown v. Allen, 344 U. S. 443, 480, 73 S.Ct. 397, 97 L.Ed. 469; Stickney v. Ellis, 5 Cir., 286 F.2d 755; Wilson v. Sigler, 8 Cir., 285 F.2d 372.

[3] The coroner, a pathologist who performed a complete autopsy, was of the opinion that several of her injuries were severe enough to be fatal, but he thought the immediate cause of death was strangulation.

notes were transcribed, he read the two written pages carefully and signed the second one. While in jail he had been reading a Testament.[4]

Plainly, if Davis truthfully recited the facts, the written confession and evidence of his oral and demonstrative confessions were all inadmissible. They were all admissible if the facts were those to which the officers testified. There lurked there no subtle constitutional question.

There were peripheral matters.

[fol. 156] The real contention advanced by Davis here is that his detention anywhere was unlawful, and that his unlawful detention requires a holding that the confession was involuntary. Though an escaped prisoner from lawful detention upon a conviction for assault with intent to commit rape, he could not be detained after his arrest, he says, unless promptly served with a warrant charging him with the crime of escape or with the murder of Mrs. Cooper. This contention, so patently misconceived,[5] the court does not dignify with discussion.

There is the fact that a notation appears on his arrest record that he was not to be allowed to see anyone or to use the telephone. Most of the officers knew nothing of it. All of them testified such an order was unauthorized and unenforced. The evidence is uncontradicted that Davis asked to see no one except his sister. He expressed a wish to see her on October 1, 1959 after he and several detectives returned to Charlotte from Asheville where they had been attempting to identify buildings which Davis claimed he had burglarized. Davis and one of the detectives could not find the sister's name in the telephone directory, but the next day, four days before the confession, the detective located her residence and delivered the message to her. Because of her children, she said she could not then leave her home but that she would go to see her brother when she could. She did go to see him, and she saw him when she went,

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[4] Late in the trial, one of the witnesses commented on the fact that Davis appeared to have been reading a Bible throughout the trial.

[5] See United States v. Carignan, 342 U.S. 36, 72 C.St. 97, L.Ed. 48.

though none of the detectives could recall whether this was before or after the confession.

No one else sought to see Davis until after his confession. [fol. 157] Those who sought to see him during his detention in Charlotte were not turned away.

There was the matter of food.

There were no kitchen facilities at the Charlotte City Jail. Purchased sandwiches constituted the solid food fare given the prisoners. Twice a day each prisoner was given two sandwiches.* The officers testified that usually there were extra sandwiches and some prisoners wished only one, so that, usually, a prisoner who wanted them could have three or even four sandwiches at each meal. According to the officers, on one occasion, Davis asked for hot sandwiches rather than the cold ones offered him. On that occasion, hot hamburger sandwiches and milk were procured and given to him.

The diet of sandwiches was not uninterrupted during the sixteen-day period. On October 1st and 2nd, there were regular, hot meals, one at the house of one of the detectives and others in Asheville. Moreover, Davis admitted that one of the detectives "brought me peanuts and stuff like that all along" and cigarettes, things which, according to the detective, Davis requested not because of hunger, but simply because he liked them.

There was no evidence of protracted interrogation. There was testimony that the Cooper murder was not mentioned to Davis until October 2nd and, a weekend intervening, was not again mentioned to him until October 6th, when Davis readily confessed. There was testimony that the [fol. 158] Cooper case was assigned to the entire detective division consisting of twenty-nine men. Each of the twenty-nine may have had something to do with the case, for there were a number of suspects, but there is no evidence that more than four or five of them ever talked to Davis. Davis testified that one or more of them spoke to him every day. It

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*It is true, as the majority observes, that Davis, at one point, said he got only one sandwich at the 6:00 o'clock meal. In the very next breath, however, he said, "Man, I just told you I got two at 6:00 o'clock."

is not clear that he intended to say that they spoke to him each day about the Cooper case, but there is no suggestion of any grueling or extended session of interrogation.

The officers were questioning Davis daily, or nearly so. At the time of his arrest, he was in civilian clothing and he had in his possession a number of articles which aroused their suspicion. They wished to know where he got those things and where, after his escape, he discarded his prison clothing. Davis told them of thefts and entries he had committed in the vicinity of Asheville, and the officers sought to check those stories. When they could not confirm them, they took a willing Davis with them to Asheville and nearby places, but Davis was unable to identify the scenes of his crimes.[7]

There is nothing in such investigative procedures suggestive of oppression or illegality. Nor does an otherwise lawful detention become unlawful or coercive when, for the convenience of officers engaged in a current investigation, the prisoner is temporarily held in a jail where he is readly accessible to the officers.

[fol. 159] Finally, Davis makes no claim, as such, that he was not informed of his rights. If there is such a claim or "allegation," it is inferred from his testimony that on October 6th he was threatened and induced to sign a paper by a promise of food. The only direct testimony on the point is that of the officers, who said that Davis was fully informed of his constitutional rights. The written confession recites the fact that he was.

From the foregoing it is apparent there was an evidentiary basis for the finding that the confession was voluntary. If there had never been a hearing, doubtless the "allegations"[8] of the petitioner would suffice to require one, but

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[7] Davis did not tell them of the thefts he committed in the vicinity of Elmwood Cemetery in Charlotte, until after his confession when he led them to the places where he had concealed his prison shoes and other clothing. Earlier, he had insisted that all of his petty larcenies had been committed in the mountains near Asheville.

[8] In the petition there are no pertinent allegations beyond the conclusionary statement that the confession was involuntary and coerced. By reference, the petition incorpo-

there has been a full hearing, and the evidence supports the finding of the state trial judge, in which the District Judge has now concurred.

When, in the murder trial, Davis objected to the admission of the written confession, the jury was excused. In the absence of the jury, the factual issues, upon which the admissibility question was dependent, were fully developed through the testimony of Davis and several of the officers. On the basis of that testimony, the trial judge ruled that the confession was voluntary and admissible.

After the trial judge found the confession voluntary and admissible and the jury's return, a number of witnesses were examined and cross-examined on matters affecting [fol. 160] the voluntary nature of the confession. All of the peripheral matters, the duration of the detention in the city jail, the notation on the arrest record, the visit of the sister, the food Davis received and the officers' inquiries of him, were fully developed in testimony taken in the presence of the jury. Davis did not testify in the presence of the jury so that his testimonial version of the events of October 6th, when the confession was executed, was before the jury only inferentially from the negative statements of witnesses who did testify.

On the basis of the evidence before it, the jury's verdict of guilt is a finding of fact that the confession was voluntary. In his instructions to the jury, the trial judge reviewed the defendant's contention that he had not confessed the murder and that if he implicated himself in any way, he did so when he was hungry, when he had been threatened and under other circumstances indicating his conduct was involuntary. The jury was told that reasonable doubt of guilt could be founded upon doubt that the confession was voluntary.

There is not the slightest indication that the trial judge or the jury applied an erroneous legal standard when resolving the essentially factual issue of the voluntary nature of the confession. What the court said in its charge to the jury

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rated within it the entire record of the proceedings in the state courts. The "allegations," to which the majority opinion refers, are extracted from the evidence offered in the full evidentiary hearing held in the state court.

indicates that both judge and jury applied a proper legal standard. If that portion of the charge might have been elaborated, Davis did not request it and has never found fault with the charge on that score.

On direct appeal, the North Carolina Supreme Court carefully reviewed the evidence and held it sufficient to [fol. 161] support the finding that the confession was voluntary.[9] In performing its appellate function, it was unembarrassed by the absence of detailed and specific findings on subordinate factual questions. It did not remand for more specific findings nor did it order a new trial because of their absence.[10] It affirmed, as we would do on direct appeal if a District Judge, after hearing conflicting evidence, had found generally that the tendered confession was voluntary and admissible.[11]

Though a general finding by a District Judge that a confession was voluntary and admissible would be unassailable in this court on a direct appeal, though the North Carolina Supreme Court has treated it as having resolved the factual controversy, this court now says that such a ruling by a state trial judge is a "fatal flaw" [12] requiring a retrial in the federal courts of the factual controversy it settled.

To me, the doctrine is both novel and alarming. There ought to be a double standard here, for we have no general jurisdiction to review the judgments of state courts. Certainly we ought not to prescribe more stringent rules for state court judges than for federal. If, in similar circumstances, a general finding by a District Judge would be treated as determinative of the facts, surely such a finding

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[9] State v. Davis, 253 N.C. 86, 116 S.E. 2d 365.

[10] It was not asked to do so, of course, but neither is this court.

[11] Rule 52 of the Federal Rules of Civil Procedure requires specific findings in nonjury civil cases. There is no comparable rule in the Criminal Rules. There is no rule requiring a District Judge in any case to pause and make specific findings of fact when ruling on the admissibility of evidence.

[12] Brown v. Allen, 344 U. S. 443, 506, 73 S.Ct. 397, 97 L.Ed. 469.

[fol 162] by a state trial judge should be so treated by us when the District Court has so treated it and has concurred in it.

The majority recognizes that appellate courts accept a general finding that a confession was voluntary. This is said to result from the fact that appellate courts have no facilities for factual inquiries. It is true that we do not possess such facilities, but that is not the reason for the appellate practice. The reason is that the finding of the trial judge is due the respect it receives in this and other appellate courts. If it is not due that respect, if in a nonjury case a District Judge fails to make requisite specific findings, we have the power to remand for additional findings or for a new trial. When the findings are defective, there is an appellate remedy. It is because a general finding that a confession is voluntary and admissible is not defective as a finding that it is accepted in this and other appellate courts as foreclosing all questions except of sufficiency.

We are told that the Supreme Court's denial of the petition for certiorari is without significance to an appraisal of the effect of the earlier proceedings.[13] If the Supreme Court had granted the writ, however, if on direct review of the North Carolina judgment it had fully considered the constitutional claim Davis advances here, surely its considered judgment would have been of significance in the habeas corpus court. There is no doubt that had the Supreme Court granted the writ, it would have considered only the sufficiency of the evidence to support the finding, treating the state court judgment as dispositive of the fact-[fol. 163] ual issues.[14] Had the Supreme Court affirmed the

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[13] Brown v. Allen, 344 U.S. 443, S.Ct. 397, 97 L.Ed. 469.

[14] Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed. 2d 1265; Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86; Harris v. South Carolina, 338 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1815; Turner v. Pennsylvania, 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810; Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481.

North Carolina judgment,[15] would the habeas corpus court be required to disregard the state court judgment as a resolution of the historic facts and retry the confession issue? The majority holds it would, for it says the habeas corpus court may not accept the finding, though the finding is perfectly acceptable in appellate courts on direct review.[16]

For the principles which should govern us here, I turn first to Brown v. Allen, as does the majority. I do so with particular readiness, for the Brown case is precisely like this one. It involved a North Carolina prisoner who claimed a [fol. 164] confession had been coerced. When he objected

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[15] The great probability is that it would have affirmed, for the sufficiency question is insubstantial.

[16] If the majority be right in their view, what becomes of the doctrine of exhaustion of remedies? Is the state court prisoner seeking a retrial of the confession question before a federal judge to be required to joust with windmills in state appellate courts and in the United States Supreme Court where the only possible issue is the sufficiency of the evidence to support the general finding, an issue quite unlike the factual one he expects to tender in the habeas corpus court? Or must he exhaust state court remedies with respect to his contention that the general finding was not a final determination of the facts? The latter requirement would be as fruitless as the first, for if the question was raised in the state appellate courts and in the United States Supreme Court those courts would clearly find no infirmity in the general finding because of its want of specificity as to subordinate facts. But if the finding is held to be without infirmity when reviewed directly, and the holding is implicit in the treatment of the issue of the sufficiency of the evidence, is the habeas corpus court bound to hold that the finding did not have the effect which all courts on direct review quite correctly held it to have had?

The majority says it is. I think that when a state court's finding is in such form that the United States Supreme Court, on direct review, will accept it as sufficient and as a conclusive determination of the facts, it is no business of ours to say a habeas corpus court errs if it treats the finding as sufficient or if it attributes any significance to it.

to admission in evidence of the confession, the jury was excused and, in its absence, Brown and two police officers testified. Their stories differed. The trial judge then found, generally, that the confession was free and voluntary.[17] Later much of this ground was again explored in the presence of the jury except that Brown did not testify in the jury's presence. The jury found him guilty. Brown exhausted his state remedies and then sought habeas corpus in the District Court. The petition was denied without a hearing. This court affirmed and was affirmed, in turn, by the United States Supreme Court. With proceedings exactly like those in Davis, in a trial court of the same state, exactly the same kind of general finding as to the voluntary nature of the confession was held to make unnecessary a retrial of the factual issue in the habeas corpus court.

The very point upon which we now disagree was expressly considered and determined in Brown v. Allen. Brown contended that the federal habeas corpus court committed error when it refused the writ on the basis of the state court record without taking evidence and retrying the factual disputes underlying the constitutional claims.[18] The contention was rejected. The holding is summarized in the statement, "Since the complete record [of the state court proceedings] was before the District Court, there was no need for rehearing or taking of further evidence."[19] [fol. 165] There was no dissent from that conclusion.

If one overlooks the holding of the Court on the point and considers only the concurring opinion of Mr. Justice Frankfurter, in which a majority of the Court concurred, the answer might seem uncertain. But Mr. Justice Frank-

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[17] The court's ruling does not appear *verbatim* in any of the published reports. In none of the published reports, however, is there any suggestion of specific findings resolving the factual controversy. An examination of the record confirms the fact that there were none. The finding was specific as to certain admitted facts, but was entirely general as to the facts in dispute.

[18] See the opinion of the Court by Mr. Justice Reed, particularly the portion under the heading "Right to Plenary Hearing," 344 U.S. 460, et seq.

[19] Id. 465.

furter was not addressing himself to this point as applied to the particular facts of the Brown case. He was concerned with the suggestion that the habeas corpus jurisdiction should be more limited and its exercise controlled by rigid rules.[20] His opinion is a powerful exposition of the view that the jurisdiction should be available when essential to the protection of constitutional rights, and that its exercise should be governed by general principles rather than by rigid rules which would leave no room for the exercise of judgment by a District Court. In the course of his exposition of his general views, he referred to contrasting situations to illustrate a point that in the habeas corpus court some earlier adjudications are entitled to more weight than others. Speaking apparently of petitions for post-conviction relief, he said that in some cases the state court "has held a hearing and rendered a decision based on specific findings of fact;" while, "[a]t the other pole is the perfunctory memorandum order denying a badly drawn petition and stating simply that the petitioner is not entitled to relief." His statement that a rehearing of the facts by the habeas corpus court in the former situation "would make only for burdensome and useless repetition of effort"[21] was not intended to be exclusive, for he was dealing in illustrative contrasts.

[fol. 166] Was Mr. Justice Frankfurter of the opinion that a rehearing would be required in the habeas corpus court if the state court's findings were general rather than specific? Obviously not, for he joined the judgment of the Court that the District Court was not required to rehear the facts in the Brown case where the general finding that the confession was voluntary was unaccompanied by specific findings of the underlying facts insofar as those facts were in dispute.

I cannot agree that the Court in Thomas v. Arizona, 356 U.S. 390, "merely restated the usual appellate practice" on direct review rather than the effect of the prior adjudication when considered by the habeas corpus court. The case came up from the habeas corpus court, so that, in the

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[20] See the concurring opinion of Mr. Justice Jackson, 344 U.S. 532, et seq.

[21] 344 U.S. 504.

Supreme Court, it was in the same posture as is this case in this Court. Nor can I agree that the issue of fact resolved by the state court's general finding that the confession was voluntary "was not a particularly significant one under the circumstances." It was crucial.[22]

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[22] Thomas, suspected of murder, was discovered and arrested by the Sheriff of Cochise County, Arizona, heading a posse of 12 to 15 men. After Thomas was handcuffed by a state highway patrolman, a member of the posse, a mounted rancher lassoed Thomas around the neck and jerked him a few steps in the direction of the nearest trees. Later he was again lassoed by another mounted rancher and pulled to his knees. The Sheriff intervened and stopped these overt threats of lynching. However, in the State Court trial, the highway patrolman testified that when Thomas was roped the first time, the Sheriff said, "Will you tell the truth, or I will let them go ahead and do this." The Sheriff denied making the statement.

The next day Thomas orally admitted his guilt in the presence of a Justice of the Peace and of the Sheriff. Later two written confessions were taken, in each instance, in the presence of several armed men.

When these confessions were offered in the state trial court, a preliminary hearing was held in the absence of the jury. At its conclusion, the trial judge ruled the written confessions inadmissible. He found them involuntary because of the lynching threats and the presence of armed men when each of those confessions was taken. The earlier oral confession, he found to have been voluntary, however, because of the presence of the Justice of the Peace and of the Sheriff, who had been the defendant's protector. There was no doubt that the Sheriff had been the defendant's protector, but the trial judge made no specific finding on the conflicting testimony as to whether the Sheriff conditioned his protection upon the defendant's telling the truth.

In the habeas corpus proceeding, therefore, Thomas contended that the first oral confession was infected by the same threat which invalidated the subsequent written ones. The Sheriff, who was present, he contended, had told him under very dramatic circumstances that he would permit his lynching if he did not tell the truth. The ultimate con-

[fol. 167] With respect to that factual issue, the Supreme Court said, emphasis being the Court's:

> "• • • Whatever the merits of this dispute, our inquiry clearly is limited to a study of the *undisputed* portions of the record. '[T]here has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved [against petitioner] by the State's adjudication.' Watts v. Indiana, 338 U.S. 49, 51-52 (1949). Time and again we have refused to consider disputed facts when determining the issue of coercion. See Gallegos v. Nebraska, 342 U.S. 55, 60-61 (1951); Haley v. Ohio, 332 U.S. 596, 597-598 (1948); Ward v. Texas, 316 U.S. 547 (1942). The rationale behind such exclusion, of course, lies in the superior opportunity of trial court and jury to observe the witnesses and weigh the fleeting intangibles which may indicate truth or falsehood. We abide by the wisdom of that reasoning.
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> "Petitioner has an alternative prayer that his case [fol. 168] be remanded to the District Court for a plenary hearing on the issue of coercion. There is no merit, however, to his contention that the District Court erred in denying the writ on the basis of the record without a full hearing. The granting of a hearing is within the discretion of the District Court, Brown v. Allen, 344 U.S. 443, 463-465 (1953), and no abuse of that discretion appears here." 356 U.S. 402-403.

Thus, Thomas v. Arizona is an express holding that the factual dispute underlying the admissibility of the confession is resolved by the general finding of the state trial judge, the finding being conclusive upon the federal appellate courts in a later habeas corpus proceeding if the District Court accepted it as such. The District Court, on

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clusion that the oral confession was voluntary thus depended upon a resolution of the factual dispute over the Sheriff's words. As to that highly significant fact, there was no specific finding in the state trial court. There was only the general finding that the confession was voluntary.

the other hand, has more latitude. It may accept the state court finding, or, in its discretion, it may reconsider the dispute and make its own findings. When there has been no abuse of that discretion, this Court has no right to say it must be exercised one way or the other.

The same approach was followed in the most recent case in the Supreme Court. In Reck v. Pate, 367 U.S. 433, the District Court in the habeas corpus proceeding disregarded the evidence of physical brutality on the part of the police because of the general, entirely unspecific, finding of the state trial court that the confession was voluntary.[23] The Supreme Court proceeded on the same assumption, but found that the undisputed facts, as outlined by the District Court, disclosed coercion as a matter of law. No one suggested that the District Court wrongly exercised its dis- [fol. 169] cretion when it accepted the general finding of the trial court as determinative of the conflicting evidence of physical abuse.

Time and gain, Courts of Appeals have held that a District Judge need not retry in a habeas corpus proceeding factual issues underlying the admission in evidence in a state criminal trial of a confession which the defendant claimed to have been coerced. In many of these cases, the rule is applied, as in the Supreme Court, when the state court finding was general only and without specific subsidiary findings as to disputed evidentiary facts.[24] The rule is applicable, of course, only if the question of the voluntary nature of the confession has been fairly heard in the state court and fairly resolved. Until today, however, there is no doctrine that specific determination of subsidiary facts in dispute is a prerequisite to such a conclusion that the state had fairly heard and determined the issue.

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[23] The finding is set out *verbatim* in footnote 1 of the dissenting opinion, 367 U. S. 450.

[24] United States v. La Vallee, 2 Cir., 279 F.2d 396; United States v. Murphy, 2 Cir., 293 F.2d 563; Application of Tune, 3 Cir., 230 F.2d 883; Stickney v. Ellis, 5 Cir., 286 F.2d 755; Wooten v. Bomar, 6 Cir., 267 F.2d 900; Wilson v. Sigler, 8 Cir., 285 F.2d 372; Muhlenbroich v. Heinze, 9 Cir., 281 F.2d 881; Schlette v. California, 9 Cir., 284 F.2d 827. And see Newsom v. Smyth, 4 Cir., 261 F.2d 452.

The cases in this Court, upon which the majority relies, are inapposite. They are close to the nether pole of which Mr. Justice Frankfurter spoke in Brown v. Allen when contrasting the extreme differences between state adjudications. Cases in which there was no finding in the state court do not bear upon the weight the habeas corpus court may give to a general finding of a state court made at the conclusion of a full evidentiary hearing when the complete record is before the habeas corpus court.

[fol. 170] Thus in Holly v. Smyth, 4 Cir., 280 F.2d 536, the habeas corpus petition attacked a state court conviction. There were allegations of a denial of the right of counsel and of circumstances which would require recognition of the right of counsel under the doctrine of Betts v. Brady, 316 U.S. 455. There had been an earlier habeas corpus proceeding in the state courts, but the record of those proceedings was not before the District Court. The District Court dismissed the petition for insufficiency. It did not rely upon any finding of the state court, for no finding of any kind was before it.[25] Necessarily, we reversed, but in doing so created no precedent for our disposition of this case.

United States ex rel. Sileo v. Martin, 2 Cir., 269 F.2d 586, is no less inapposite. A postconviction proceeding in the state court had been dismissed without explanation. The dismissal as readily could have been founded upon a legal conclusion of insufficiency of the allegations to require discharge as upon a disbelief of those allegations. It could

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[25] In this Court, an order entered in the habeas corpus proceedings in the Hustings Court of Portsmouth was tendered. It recited that counsel was present at the trial and that counsel appeared in Holly's behalf as well as for his co-defendants. The petition had alleged that his co-defendants were represented by counsel, a circumstance which was thought to have aggravated Holly's disadvantage in undertaking his own defense. An exhibit from the state trial court indicated that Holly had no counsel.

Even in this Court, the full record of the proceedings in the Hustings Court was not produced. Had it been, whatever it revealed, it could not have saved the case, for this Court cannot perform the office of the District Judge.

not be said with any assurance that the state court's dismissal without explanation was a general finding of fact.

If that case be thought indicative of the view the Court of Appeals for the Second Circuit would take of the present situation, the thought should be dispelled by the later case [fol. 171] of United States v. Murphy, 2 Cir., 293 F.2d 563. There it was held that the District Court was justified in accepting the general finding of the state court that the confession was voluntary and that a retrial in the habeas corpus court of the factual dispute was not necessary.

Here, in contrast to the cases cited by the majority, there was a finding. While it was unspecific as to the details of the underlying factual dispute, it was in such form that it commanded acceptance in every appellate court on direct review as a final determination of the facts. The full record of the proceedings in the state courts was reviewed by the habeas corpus court.

No one suggests that the issue of coercion was not fairly tried in the state court and fairly determined. There is nothing in those proceedings suggestive of a fatal flaw. The constitutional issue was not ignored. There was deliberate inquiry into it, and the trial court's disposition of the issue merited the affirmance it received on direct appeal.

I thus find in the decisions of the Supreme Court and of the Courts of Appeal commanding authority which requires affirmance here. I find no support for reversal. After a careful review of the entire record of the proceedings in the state courts, the District Court exercised the discretion vested in it to accept the state court's determination of the facts. It went further. It independently appraised the evidence offered in the murder trial and concurred in the state court's finding. If, in other circumstances, a District Court might be said to have abused its discretion in refusing to hear additional evidence,[26] no such abuse can be found when there was no such refusal.

[fol. 172] The judgments of my brothers have my great respect. Whatever the infirmities of my own perception, however, when I find my judgment so much at odds with theirs as to a principle of great importance, I have a duty of dissent. I respond to that duty.

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[26] See, however, the cases cited in footnote 2, supra.

[fol. 173] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8453

ELMER DAVIS, JR., Appellant,

vs.

STATE OF NORTH CAROLINA, Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina.

JUDGMENT—November 7, 1962

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of North Carolina, at Raleigh, for proceedings consistent with the opinion of the Court filed herein.

November 7, 1962.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

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[fols.1-3] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

ELMER DAVIS, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent.

Transcript of Hearing Upon Writ of Habeas Corpus

The following testimony was taken by Wilda Y. Hauer, Official Reporter, before Honorable Algernon L. Butler, Chief Judge, United States District Court, Eastern District of North Carolina, in the Grand Jury Room, United States Court House and Post Office Building, Raleigh, North Carolina, beginning at 10:00 A. M., Wednesday, February 20, 1963.

[fol. 4] APPEARANCES:

Charles V. Bell, Esq., 422½ East Second Street, Charlotte, N. C. W. B. Nivens, Esq., 235 South Brevard Street, Charlotte, N. C. Calvin L. Brown, Esq., 235 South Brevard Street, Charlotte, N.C., Attorneys for the Petitioner.

Kenneth R. Downs, Esq., 219 Law Building, Charlotte, N. C. Harry W. McGalliard, Esq., N. C. Attorney General's Office, Raleigh, N. C. James F. Bullock, Esq., N. C. Attorney General's Office, Raleigh, N. C., Attorneys for the Respondent.

The Court: This is a hearing upon a Petition for a Writ of Habeas Corpus filed by Elmer Davis, Jr., a state prisoner. At the December Term, 1959, of the Superior Court of Mecklenburg County, North Carolina, the Petitioner was convicted of murder in the first degree and is now in the custody of the State of North Carolina and confined at the State Penitentiary at Raleigh in this district, under sentence of death.

[fol. 5] The Court has issued a Writ of Habeas Corpus pursuant to mandate of the United States Court of Appeals to hear whatever evidence the parties adduce in connection with the detention of the Petitioner.

Is the Petitioner present in Court?

Mr. Bell: Yes, sir.

The Court: Let him stand. He may be seated. The Petitioner may offer his evidence.

Mr. Bell: Your Honor, at this time we would like to make a motion that all the records that are in the custody of this Court be admitted in evidence—all the records and all prior hearings up until this time be admitted in evidence.

The Court: Now, you have reference to the record in the original trial in the Superior Court of Mecklenburg County?

Mr. Bell: Yes, sir.

The Court: All right Will you enumerate now; what other records?

Mr. Bell: That will take in the confession.

The Court: I understand. What other hearings?

Mr. Bell: Well, at the trial of Elmer Davis in the Superior Court, and then all records that were before the Supreme Court of North Carolina when it was heard before the [fol. 6] Supreme Court; the Petition for Certiorari before the United States Supreme Court, and all records pertaining thereto; all records pertaining to the Writ of Habeas Corpus which was filed in the Eastern District Court here to which our petition was denied—all records pertaining to that hearing; and then all records pertaining to the appeals that have been heard before the Fourth Circuit Court of Appeals; the hearing conducted at Baltimore, and the hearing conducted in Asheville.

The Court: By "hearing" you mean the argument before the Court?

Mr. Bell: Yes, sir. We would like to also make a motion that all records including the original—It is my information that the original Arrest Sheet is now in the hands of the Charlotte Police Department, and we want that record admitted in evidence, if it is.

The Court: All right, gentlemen, you have heard the motion of the Petitioner. Is there any objection on behalf of the Respondent?

Mr. Downs: No objection.

The Court: Very well, the records are admitted. Now, you have referred to an original Arrest Sheet. I presume it would be necessary that that sheet be produced and actually admitted if the Court is to have the advantage of whatever it purports to show.

Mr. Bell: Your Honor, Mr. Yandle is custodian of the [fol. 7] records in the City Police Department. If he has this record, I would like for him to produce it.

The Court: Does the Respondent have the record to which he refers?

Mr. Downs: Your Honor, he refers to this record as being the original Arrest Sheet. I don't believe we have that. We have a copy that was made off the record.

The Court: Suppose you exhibit that to counsel for the Petitioner and see if it may be stipulated that that may be used in lieu of the original.

Mr. Downs: The original was subsequently destroyed to the best of my recollection.

Mr. Bell: Your Honor, we would like for the record to show that the original was destroyed and that this record here is a copy of it.

The Court: Do you have any objection to the use of the copy in lieu of the original records?

Mr. Bell: No, sir.

The Court: Very well.

Mr. Downs: Your Honor, we object to his statement that this is an exact copy of the original, because we contend that some of this information was not on the original Arrest Sheet.

[fol. 8] The Court: Can counsel agree upon a stipulation?

Mr. Bell. Your Honor, I'd like for Mr. Downs to state what portion of this paper writing here is incorrect.

Mr. Downs: May it please the Court, let me offer this explanation about this particular record. When this defendant was originally brought from the Police Department, Belmont, North Carolina, the City Police Department used an envelope similar to this envelope which I have in my hand. His personal belongings and matters were filled out on the front of this Manila envelope or an envelope similar to this Manila envelope here. The Manila envelope followed the prisoner over to the county jail. This record here (referring to Arrest Sheet)—part of it was copied from the envelope. Part of the information on this record was made, according to the way we say, at a later date by someone other than the man who made the original envelope out. The original envelope went to the county jail. The record down here shows "NOTHING," and since this man had no personal property to be kept in the Manila envelope,

which was the original arrest record in this case, the envelope was thrown in the trash by the Macklenburg County jailer; and the matter did not arise as to where it had gone, and it was not in the trial of this matter. This is copied from the Manila envelope. Some of the information was [fol. 9] copied at that time. We contend that this portion in here was probably not on that original envelope.

The Court: Now, you have referred to an envelope. Is that what has been referred to as the Arrest Sheet? What is the Arrest Sheet? Is that the envelope, or the paper upon which the information on the envelope was transferred? Let me direct this to counsel for the Petitioner: What do you mean when you say you desire to offer in evidence the "original Arrest Sheet"?

Mr. Bell: Well, it is my information—and I think it is in this record—that when a man is arrested and is in custody of the police department and brought in for investigation, or any systematic arrest or ordinary arrest, then an Arrest Sheet is made out.

The Court: What is the Arrest Sheet? What does it look like?

Mr. Bell: It looks something like that. Your Honor, they had the original Arrest Sheet in the trial in the Macklenburg County Superior Court, and we say and contend to the Court that this original Arrest Sheet was intentionally destroyed by the police department; and here's a copy of it here. Here's a copy of the original Arrest Sheet. [fol. 10] The Court: What you are now showing me, which appears to be a photostatic copy of a document bound within a binder bearing the inscription, "Transcript of Record in Case on Appeal, State of North Carolina against Elmer Davis, Jr.," is this document, photostatic copy of the document, what you refer to as the original Arrest Sheet?

Mr. Bell: Yes, sir, the original Arrest Sheet.

The Court: Show that to counsel for the Respondent and see if it may be stipulated that that was offered in evidence in the State trial. Now, all I want to know, gentlemen, is this: whether or not that photostatic copy was the document that was a part of the record of the case on appeal in the appeal to the Supreme Court.

Mr. Downs: May it please the Court, the Court stenographer or Court reporter who was the reporter at that

time is no longer employed in Mecklenburg County, and I have secured all the documents and exhibits that were purportedly introduced in this matter; and the top portion of what he is asking about is this paper here, but the paper that is below, which is apparently a copy of this paper, according to what has been turned over to me and according to my recollection was never introduced in evidence. The top part of this one here, the one I have tendered to him, [fol. 11] has been introduced; but the bottom was not.

The Court: Well, now, was that bottom portion which you say was not introduced, was that incorporated as a part of the record on appeal to the Supreme Court of North Carolina in that case?

Mr. Downs: It was incorporated in the record.

The Court: Very well, then that will be admitted in evidence as a part of the official records of the case on appeal in this case. Now, if there are any other documents that anybody wishes to offer on either side, we will entertain those when the time comes.

Mr. Bell: Your Honor, this is a matter of utmost importance; and this original record, we contend, is in the custody and possession of the Charlotte Police Department; and we say and contend that they intentionally are withholding it.

The Court: Well, now, let me inquire of this: You have just handed up to me a document inscribed, "Transcript of Record in Case on Appeal, State of North Carolina against Elmer Davis, Jr." Do you contend that this document that you have exhibited to the Court is a true and correct copy of the Transcript of Record in Case on Appeal to the Supreme Court of North Carolina?

Mr. Bell: Yes, sir.

The Court: Does it contain a photostatic copy of what [fol. 12] you have referred to as the original Arrest Sheet?

Mr. Bell: Yes, Sir. I, personally, secured it myself from the police department.

The Court: That has been admitted in evidence in this case.

Mr. Bell: But, Your Honor, we want to ask the Court if we could make some inquiry about the original Arrest Sheet.

The Court: Is the original any different from the copy that you have exhibited to the Court?

Mr. Bell: There is a possibility that some information contained therein isn't there, and we'd like to make some inquiry as to that here.

The Court: Very well. Does counsel for the Respondent have in its possession, or does the Respondent have available to it the original Arrest Sheet in this matter?

Mr. Downs: No, sir, we do not. We do not have it in our possession, and we do not have it available.

The Court: Do you know where the original is?

Mr. Downs: No, sir, we do not. It has been misplaced or lost somewhere in the county office.

The Court: Very well. Anything further?

Mr. Bell: Well, Your Honor, we would like to question Mr. Yandle who is custodian—captain in the Charlotte [fol. 13] Police Department, and he is present, and I think he is presently acting as custodian of the records or captain of the Records Department. We would like to inquire of him where this record is.

The Court: You have a right to put on any evidence you please; call any witnesses you want.

JOHN W. YANDLE, called as a witness by the Petitioner, having been duly sworn, testified as follows:

Direct examination.

By Mr. Bell:

Q. What is your name?

A. John W. Yandle.

Q. Captain Yandle, are you a member of the Charlotte Police Department?

A. Yes, sir.

Q. How long have you been a member of the Charlotte Police Department?

A. Thirty years and nine months.

Q. Are you an officer of this department?

A. Yes, sir.

Q. What is your office now?

A. Captain of the Records Bureau.

Q. Now, on September the 21st, 1959, were you serving [fol. 14] in the capacity as Captain of the Records Department of the Charlotte Police Department?

A. Yes, sir.

Q. Did you testify in the Superior Court of Mecklenburg County when Elmer Davis was tried for the murder of the late Foy Bell Cooper?

A. I testified as to a record, yes.

Q. Do you remember my asking you this question:

"Do you have in your possession the original Arrest Sheet made on Elmer Davis, Jr.?"

And you answered it this way:

"I have in my possession the original Arrest Sheet made on Elmer Davis, Jr."

I will show it to you.

A. My answer to that was: "I have in my possession the original, typed Arrest Sheet on Elmer Davis, Jr."

Q. And at that time, Captain, you had in your possession the original, typed Arrest Sheet on Elmer Davis, Jr. Where is that record?

A. That is the record that is known to us as the original Arrest Sheet that Mr. Downs has.

Q. So Mr. Downs was incorrect when he said that this was not the original, typed Arrest Sheet?

A. For some reason there is a——

Q. I want you to answer my question, Captain.

[fol. 15] A. I'm trying to answer it.

Q. I said Mr. Downs was incorrect when he said that?

A. I don't know whether Mr. Downs was mistaken or not in his belief.

Q. I'm not talking about belief. I said was he incorrect or not?

A. I don't know.

Q. Is this the typed copy of the original Arrest Sheet?

A. That is the original Arrest Sheet as far as the police department is concerned in the City of Charlotte.

Q. Is this sheet made out in triplicate?

A. It is.

Q. Why is it made out in triplicate?

A. At the time we were using that there was a white copy, a pink copy, and a canary copy. The white copy went with the prisoner to the jail and on to our Court so that the disposition could be written on the original Arrest Sheet or white copy. The canary copy was kept by the desk sergeant so that he would have a record of who was in our jail. The pink copy went to the Records Bureau and was filed numerically for statistical purposes.

Q. Now, which copy went to the jail?

A. The white copy.

Q. I want you to tell the Court why this copy was sent to the jail.

[fol. 16] It was the system used that this copy would go to the jail, and as long as the prisoner was in jail this copy was in the custody of the jailer.

Q. For what purpose?

A. For his records as to who was in jail and also available for the fingerprint officer to get this copy to fingerprint the man and put on this copy his fingerprint number.

Q. And it was also sent up there for the purpose of directing the jailer as to what conditions and circumstances the prisoner was supposed to be held?

A. I couldn't say that.

Q. Well, would you read the contents of this to the Court?

A. When this arrest ticket was typed up——

Q. Will you read the contents of it, Captain?

A. Where do you want me to start?

Q. At the top of it.

A. "Davis . . ."

The Court: Are you going to offer this in evidence?

Mr. Bell: Yes, sir.

Mr. Downs: Objection.

The Court: Overruled.

(Marked Petitioner's Exhibit No. 1.)

[fol. 17] A. (Reading from P-1) "Last Name: Davis, First Name: Elmer," Middle Name: "Junior. Cell, 92; Time of Arrest, 11:00 P. M.; Date, 9-21-59; Sex, Male; Color, Colored." His age was typed at 29 and changed to 32. His complexion was "chocolate"; his hair was "black"; his eyes "brown." The charge was "Hold."

The place of arrest was "Belmont Police Department." The arresting officers were W. O. Holmberg, Lieutenant Gilleland, and J. W. Porter. "Facts of the Arrest, Hold for Hucks & Fesperman re-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to" use the "telephone." Typed by Harold Robinson. In his possession was nothing of value.

OFFER IN EVIDENCE

Mr. Bell: Your Honor, we would like to offer this in evidence.

(Offered and accepted in evidence as Petitioner's Exhibit No. 1.)

By Mr. Bell:

Q. Captain, when this case was tried in the Superior Court of Mecklenburg County, I believe you were asked the question:

"Well, this was put in jail for him, a copy of that?" And you answered: "Yes."

Is that correct?

[fol. 18] A. That is correct.

The Court: Read that question and answer to me. I didn't get that.

Mr. Bell: "Well, this," referring to the record, "is put in jail for him, a copy of that?" referring to that record. and he answered it, "Yes."

By Mr. Bell:

Q. Then I will ask you, Captain, did I further ask you:

"On that prisoner, and he is supposed to govern himself accordingly?"

A. And the answer was, "Yes." Yes.

Q. When you answered that yes, Captain, I ask you if you didn't mean that the jailer is supposed to hold this man under circumstances enumerated on his copy of the Arrest Sheet?

A. The Arrest Ticket was sent to the jailer for him to hold, yes.

Q. And that according to the directions on the Arrest Sheet?

A. I would say yes.

Q. So, now, Captain, you say, if that is true, he was held without having the benefit of counsel?

A. No. No, I don't say that.

Q. I say he was held without having the benefit of counsel?

[fol. 19] A. No, I wouldn't say that.

Q. Well, don't you know that no counsel went to see him?

A. No, I don't know that.

Q. Well, he was held without having anyone who could see him?

A. I don't know that. Mr. Bell, I'm in the Records, not the jailer.

Q. I understand that. But the jailer was supposed to hold him under those circumstances. Didn't you just say that?

A. That's true, yes. But I don't know what happened after that, Mr. Bell.

Q. Captain, can you tell me why the jailer received the instructions—and these instructions were transferred from your department to the jailer for the purpose of all jailers—not to allow this man to use the telephone or not to allow him to see anyone?

A. What was your question again, please?

Q. I say do you know why this information was sent to the jailer?

A. No, I do not.

Q. You do not?

A. No. I didn't order it put on the Arrest Ticket.

Q. Do you know how long Elmer Davis was held in jail?

A. No, I do not.

[fol. 20] Q. Do you know whether it was sixteen days?

A. No, I do not.

Mr. Downs: If it please the Court, we will stipulate that the defendant was held in custody sixteen days before the confession in question.

The Court: Does counsel for the Petitioner desire such stipulation?

Mr. Bell: I didn't hear that. Did he say he would stipulate that he was held incommunicado for sixteen days?

Mr. Downs: No, I didn't say that.

The Court: Will you state your stipulation again, please?

Mr. Downs: The State will stipulate the defendant was held in custody sixteen days before making the confession which is in question before the Court today.

The Court: Do you desire that stipulation?

Mr. Bell: Yes, sir, we would like that to be in the record. And I would like for him to further stipulate, if he will, that he was held without having the privilege to use the telephone, without having the privilege to confer with relatives, without having the privilege to see friends, and without having the privilege to employ counsel.

[fol. 21] Mr. Downs: Your Honor, we cannot stipulate to that, because we have evidence to the contrary.

Cross-examination.

By Mr. Downs:

Q. Captain Yandle, I call your attention to the left-hand upper portion of Petitioner's Exhibit No. 1, and ask you if there is any number up there in the left-hand corner?

A. Yes, sir.

Q. And will you tell the Court how that number was placed on that particular ticket, by what method?

A. We have a numbering machine that this number is placed on all three copies of this Arrest Ticket.

Q. It's a stamping machine, isn't that correct?

A. Yes, sir; Bates stamping machine, numbering machine.

Q. Have you ever seen Mr. Charles V. Bell, one of the counsel for the Petitioner in this matter, before this date?

A. Sir?

Q. Before this day in Court have you ever seen Mr. Bell?

A. Oh, yes, sir.

Q. You know him personally, don't you.

A. Yes, sir.

Q. And did he ever come to the City Police Department [fol. 22] and request a copy of an Arrest Sheet on Elmer Davis?

A. Mr. Bell has been in there so many times, I couldn't

answer that truthfully, sir, whether he requested it of me. He has a copy of it. Who he got it from, I don't remember.

Q. Well, sir, I show you now the photostat copy in case on appeal to the North Carolina Supreme Court and call your attention to the lower portion of this photostat, and ask you if that record that appears at the bottom portion was made at the same time Petitioner's Exhibit No. 1 was made?

A. No, sir.

Q. And would you tell the Court why you say that?

A. The bottom of this exhibit is a typed copy——

By the Court:

Q. When you say "this exhibit," please identify it.

A. I don't know how.

The Court: Can it be stipulated that the exhibit to which the witness now refers is a photostatic copy of what purports to be the Arrest Sheet which was incorporated in the transcript of the record on appeal to the Supreme Court of North Carolina?

Mr. Downs: Yes, sir.

A. This bottom half is a typed copy that was numbered on a typewriter. It was not numbered with the numbering machine; therefore, it is not the original Arrest Ticket. [fol. 23] It is a copy that someone has made of the original Arrest Ticket which shows at the top of the page.

By Mr. Downs:

Q. Now, sir, will you compare the information shown on the lower portion of that photostat copy with the Petitioner's Exhibit No. 1, and tell the Court whether or not there are any difference between the two?

Mr. Brown: Objection.

The Court: Overruled. Both of the documents, I believe, are in evidence. I will let the witness point out any difference, if any.

A. Yes, sir, there is a difference in the docket number. On the original it is Docket Number 10091.

By the Court:

Q. You refer now to Petitioner's Exhibit No. 1 when you say "original"?

A. Yes, sir.

Q. State that again.

A. The docket number, that is, the docket number of City Recorders Court is 10091; the docket number on the photostatic copy is 10014. Everything else is similar.

By Mr. Downs:

Q. I call your attention now, Mr. Yandle, to the central portion of Petitioner's Exhibit No. 1 and the central portion of the photostat copy, and ask you if the information [fol. 24] contained in the center of these documents isn't entirely different?

A. Yes, sir.

Q. And the information contained on that photostat copy has no information whatsoever about not allowing the prisoner to see anyone or use the telephone, does it?

A. No, sir.

Q. On the photostat copy they simply refer to the person against whom the crime was allegedly committed, isn't that correct?

A. Yes, sir. It reads: "Did kill and slay one Foy Bell Cooper on September 20th in Elmwood Cemetery," the facts of the arrest.

Q. Then do you know whether or not there were two Arrest Tickets made up on this one particular man?

Mr. Bell: We object.

The Court: Overruled, if he knows as a fact.

A. No, sir, there could not have been two Arrest Tickets made. One of these is a copy of the other one, sir, because this same arrest number is used.

Q. Well, at the time the photostat was made the information contained in the central portion of Petitioner's Exhibit No. 1 was certainly not copied on the photostat copy, was it?

A. No, sir.

[fol. 25] Q. Then, Captain Yandle, there is a good possibility then that the information——

Mr. Bell: Objection.

The Court: Let him finish his question.

Q. I withdraw my question and I will put it this way: The following information shown on Petitioner's Exhibit 1, "Hold for Hucks & Fesperman re-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to u-s telephone," certainly was not on that record from which the photostat copy was made; is that correct?

Mr. Nivens: Objection.

The Court: What is the basis for your objection?

Mr. Nivens: Your Honor, I am objecting because Mr. Downs is putting words into the witness's mouth.

Mr. Downs: It is cross-examination.

The Court: Well, yes, I think that on cross-examination the form of the question is not objectionable. Objection overruled.

(Question above read by Reporter.)

A. That is correct.

By Mr. Downs:

Q. Captain Yandle, you are in charge only of the Records [fol. 26] Division and the transmission of the records to the different departments, isn't that correct?

A. That's correct, sir.

Q. You do not know whether or not Davis saw anyone while he was in custody?

A. No, sir.

Q. You do not know whether Davis was permitted to use the telephone?

A. No, sir, I don't know of my own knowledge. This morning is the first time I have ever seen Davis.

Mr. Downs: That is all.

Redirect examination.

By Mr. Bell:

Q. You do know this information went up to the jail with Davis: "Hold for Hucks & Fesperman re-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to us telephone"?

A. In my knowledge of the system I am positive that this record with that typed on it went to the jailer.

Q. For the jailer to govern himself accordingly, isn't that right?

Mr. Downs: I object to that.

The Court: Yes, he has been into that.

[fol. 27] Objection sustained.

By Mr. Bell:

Q. Now, Captain, on September 21, 1959, who were the jailers?

A. Who were the jailers?

Q. Yes. In the Charlotte Police Department.

A. Mr. Bell, I wouldn't have the slightest idea.

Q. Do you know any of them?

A. Oh, yes, I know who has worked as a jailer, but I don't know who was on duty at the time.

Q. I'm not talking about who was on duty. Who were the men who were serving in the capacity of jailer on September 21, 1959?

A. G. S. Ross was a jailer at the time, O. G. Overcash, and I believe that M. H. Caskey was a jailer at that time.

Q. Now, these men work on shifts, don't they?

A. That's correct.

Q. What periods?

A. From 7:00 to 3:00, 3:00 to 11:00, and 11:00 until 7:00.

Q. Do you see either of these men in this Courtroom this morning?

A. Yes, sir.

Q. Which one?

A. G. S. Ross.

[fol. 28] Q. Captain, according to this record Elmer Davis

was kept—I believe you testified that Elmer Davis was confined in Cell Number 92?

A. The Arrest Ticket shows that he was placed in Cell 92 at the time of his arrest, yes.

Q. Where is Cell 92 located, if you know?

A. I wouldn't have the slightest idea whether it's on the third floor, the second floor, or te new part, or the old part.

Q. Well, don't you know it's on the third floor?

A. No, sir, I don't.

Q. Captain, you say you have been in and out of that jail for how many years?

A. Thirty.

Q. Thirty years?

A. Right.

Q. I'll ask you if you don't know that Cell 92 is on the third floor of the jail, located in the position——

The Court: Objection Sustained. He says he has no idea whether it's on the first, second, or third floor. He is your witness.

Mr. Nivens: May I address the Court?

The Court: Yes, sir.

Mr. Nivens: I just want to point this up to the court. [fol. 29] In a proceeding of this nature where all of these officers were in the Charlotte Police Department, certainly we would expect each of them to be hostile witnesses, and I somehow feel that we should be permitted to cross-examine each one whether they are called by the State or whether they are called by the Petitioner.

The Court: You wish to cross-examine this witness as a hostile witness?

Mr. Nivens: Yes, sir. Not only this witness, Your Honor, but I think we should be permitted to cross-examine any witness that comes from the Charlotte Police Department.

Mr. Downs: Your Honor, we object to this.

The Court: Well, if it appears that any of the witnesses are hostile witnesses, I will permit you to cross-examine them. When this witness states that he does not know where a particular cell is, do you wish to cross-examine him on that, or do you wish to prove the location of it by some witness who testifies that he does know where it is?

Mr. Nivens: Well, Your Honor, I'm speaking generally,

not specifically of this witness. This is not a case where we are being tried by a jury; this hearing is before Your Honor.

The Court: I understand.

[fol. 30] Mr. Nivens: And certainly we would expect, naturally, normally, whether we put this witness on the stand or not, every witness from the City Police Department to be in effect a hostile witness.

The Court: Well, now, while this hearing is not before a jury and there is going to be more latitude, therefore, allowed in the reception of evidence than there would be before a jury; nevertheless, there is going to have to be a limit to the amount of time that we spend in this hearing, allowing full, ample time for you to introduce any and all testimony, records, or other proof that you wish. Nevertheless, we don't want to belabor the point. Now, this witness has testified he does not know; though he has been in this position for thirty years and been in the jail off and on for thirty years, he does not know where the location of Cell 92 is. Now, how long do we want to belabor that point? If you want to cross-examine him and if you have evidence that he does in fact know where it is, I will permit you to do so. But if it is going to be a question simply of establishing for the record where the cell is located, let's prove it if we can by a witness who says he knows and not attempt to prove it by a witness who has testified he does not [fol. 31] know. You may proceed.

By Mr. Bell:

Q. Captain, do you know that there are cells located on the third floor of the police department?

Mr. Downs: Objection.

The Court: Overruled.

A. There are no cells on what you would term the first floor. We have the second floor which is the first floor of the jail, and the second floor of the jail; there is no third floor.

Q. I say the second floor of the police department and the third floor of the building?

A. That is correct.

Q. There are cells on that third floor of the building?
A. It would be three floors from the ground, yes.
Q. That's right. And I'll ask you if you don't know that they have cells on that floor where they isolate prisoners who are being held for investigation?
A. No, I don't know that.

Mr. Bell: All right, come down.

[fol. 32] G. S. Ross, called as a witness by the Petitioner, having been duly sworn, testified as follows:

Direct examination.

By Mr. Bell:

Q. Mr. Ross, you are a member of the Mecklenburg County Police Department?
A. No, sir.
Q. You are not?
A. No, sir. City of Charlotte.
Q. That's what I meant—the Police Department of the City of Charlotte?
A. That's right.
Q. How long have you been a member of this department?
A. Just a little over twenty years.
Q. Are you now serving in the capacity as a jailer in that department?
A. That's right.
Q. On the 21st of September, 1959, were you a jailer?
A. I was holding that job. Whether or not I was working that particular day, I don't remember.
Q. I'll hand you a paper writing and ask you if you have ever seen it or seen a copy of it?
A. I have seen this or one similar.

The Court: Now, will you identify what paper you have shown him.
[fol. 33] Mr. Bell: Your Honor, I am referring to Petitioner's Exhibit 1.

Q. What do you mean by "one similar"?

A. I have seen the Arrest Sheet; I don't remember whether that is the same one I saw or not.

Q. Well, did it contain the same information that is on that?

A. As far as I can remember, it did.

Q. Well, when a man is being held in jail and that information is before you, what does that mean to you?

Mr. Downs: Objection.

The Court: Overruled.

A. You mean the information to "hold"?

Q. Yes, sir, this information right here; what does that mean?

A. That means ordinarily that the officer in charge gives the permission or is present when he talks to anyone or uses the phone.

Q. In other words, that means you are not allowed to let this man use the telephone or not allowed to let him see or communicate with anybody?

A. I suppose that's——

Q. That's what it means, isn't that true?

A. That's right.

Q. Were you up there when Elmer Davis was in jail; were [fol. 34] you serving in the capacity as jailer?

A. I was.

Q. Where is Cell 92 located?

A. It's on the first floor of the jail.

Q. How long did Elmer Davis stay on the first floor?

A. I don't remember. Whether or not he was changed, I don't know. He had the same cell, as far as I know, all the time he was there.

Q. Well, don't you know Elmer Davis stayed on the first floor of the jail approximately one week and for the remaining two weeks he was transferred and stayed up on the third floor the remainder of the time?

A. No, I don't know that.

Q. Were you in jail when officers would come in there and get him?

A. Part of the time, yes. I was on the 7:00 to 3:00 shift.

Q. What officers would come and get him?

A. Oh, different ones. I have no idea now.

Q. Well, name some of them.

A. Well, Mr. Hucks.

Q. And who else?

A. Mr. Fesperman.

Q. Mr. Fesperman.

A. And Mr. Gardner. Those three I can name for sure.

[fol. 35] Q. Lieutenant Sykes?

A. I don't know whether he ever came and got him personally or not.

Q. Well, Lieutenant Sykes at that time was a member of the Detective Division of the Charlotte Police Department?

A. That's right.

Q. And he was in charge of a shift?

A. That's right.

Q. In fact the type of setup they had on September 21, 1959, is that they had a captain and two lieutenants; is that correct?

A. I believe that is correct.

Q. And the captain of the Charlotte City Detective Division of the Police Department was Captain McCall, is that right?

A. That's right.

Q. And his two lieutenants were Lieutenant Sykes and Lieutenant Gilleland?

A. That's right.

Q. And each of the three was in charge of a shift?

A. I don't know exactly what shifts they were in charge of.

Q. Well, each was in charge of a shift?

A. Each lieutenant was, yes.

Q. And that these detectives worked around the clock?

[fol. 36] A. That, I don't know.

Q. Don't you know that some member of the Detective Division was on duty twenty-four hours a day?

A. I couldn't say that.

Q. Well, were you ever on duty in the daytime as a jailer?

A. The whole time he was there I was on daytime duty.

Q. Now, you say that several officers came in to see him during the day?

A. That's right.

Q. In the evening you don't know who saw him?

A. I do not.

Q. And at night you couldn't tell the Court who saw him?

A. I could not.

Q. But we do have detectives on duty day, evening, and night?

A. That I don't know whether there is any on the third shift or not.

Q. You wouldn't say that?

A. No.

Q. That there are none?

A. I wouldn't say that there were none or that there was, because I don't know.

Q. At the present time when prisoners are brought into jail and they stay over an extended period of time, they are [fol. 37] transferred to the Mecklenburg County jail, aren't they?

Mr. Downs: Objection to the present time.

The Court: Sustained.

Mr. Bell: Your Honor, may I say this?

The Court: Yes.

Mr. Bell: The reason that we are trying to show this, we are trying to show that at the present time the policy of the police department has changed; and that they are now, instead of keeping men in the overnight jail for two or three weeks at a time, they keep them in the Mecklenburg County jail where they have proper facilities to hold them; and I think it is very germane to this question of a coerced confession.

The Court: Well, I don't know that a policy that exists now has any persuasive relevance to the policy that existed at the time. It seems to me that the acts and conduct with respect to this particular Petitioner at the particular time is a matter that is now before the Court. Objection Sustained.

By Mr. Bell:

Q. Now, Mr. Ross, I believe you have already testified that Cell 92 is on the first floor of the jail?

A. That's right.

Q. And the second floor of the building?

[fol. 38] A. Second floor of the building and first floor of the jail.

Q. What size cell is Cell 92?

A. I would say about six by ten, something like that.

Q. About six by ten?
A. Something on that order.
Q. What's in the cell?

By the Court:

Q. Now, you mean six by ten feet, of course?
A. Yes.

By Mr. Bell:

Q. Do you know about the height? You are talking about six feet long and ten feet wide?
A. Six feet wide and ten feet long.
Q. What is the height of it?
A. I don't know; approximately eight feet I would imagine.
Q. What is in the cell?
A. Well, there's a bunk.
Q. What type of bunk?
A. A steel bunk with a mattress.
Q. With what on it—sheets?
A. No sheets.
Q. How thick is the mattress?
A. I would say possibly three inches or three and a half [fol. 39] inches.
Q. What is it made out of?
A. I don't know what it is made out of, but it is covered with imitation leather. I do not know what is inside it. It feels apparently the same as an ordinary mattress, but it's covered with this imitation leather.
Q. You say that mattress is on a bunk?
A. Yes, sir.
Q. What type of bunk?
A. A steel bunk.
Q. What does a steel bunk consist of?
A. Well, steel legs, the body; the complete thing is steel.
Q. The whole thing is steel?
A. That's right.
A. Solid steel?
A. Well, the bottom part where the mattress rests is perforated, it has holes.
Q. But it's a solid piece of steel?
A. That's right. It's nothing but steel in it.

Q. No springs or anything like that?

A. No.

Q. And it's about three and a half inches thick. And what else is in the cell?

A. There's a drinking fountain and a commode.

[fol. 40] Q. All that right in the same little room?

A. That's right.

Q. And so a man would—Could a man who is in that cell get any sunlight?

A. No.

Q. It's entirely enclosed other than the front of it?

A. That's right.

Q. You have to get sunlight and air from the entrance to the cell?

A. That's right.

Q. Do you know whether Elmer Davis was confined in this cell for sixteen days?

A. I don't know the time; I don't remember it that well.

Q. It was a little over three weeks or approximately three weeks?

A. Yes, sir, it was quite some time, yes.

Q. I'll ask you, Mr. Ross, if Elmer Davis wasn't in the Charlotte city jail longer than any prisoner you know of, that you know of?

A. I believe he was. I don't know of one that long.

Q. And at that time a prisoner, some prisoners I'll say, who were held for long periods of time were sent to the Mecklenburg County jail and be transferred back to the Charlotte city jail for trial and other reasons?

A. Yes.

[fol. 41] Q. Isn't that right?

A. That's right.

Q. And that's the system that they use now?

Mr. Downs: Objection to what they use now.

The Court: Objection sustained.

Mr. Bell: Your Honor, could we let him answer that question for the purpose of this record?

The Court: Very well, let him answer it.

(Last question read by Reporter.)

A. If a person has his case continued, they transfer him to the county jail and bring him back for trial, but ordi-

narily when they are under investigation they don't go over there.

Q. And ordinarily under investigation, they don't hold a man for three weeks; isn't that right?

A. That's right.

Mr. Bell: I believe that is all, Mr. Ross.

Cross-examination.

By Mr. Downs:

Q. Mr. Ross, were you aware that Elmer Davis was an escaped prisoner from the North Carolina prison system?

A. I was.

Q. Now, the city jail at the time, the period between the 21st of September, 1959, to October 6, 1959—will you [fol. 42] state what type of ventilation the jail had?

A. Well, we have floor fans and the outside windows.

Q. You have fans that constantly change the air inside the jail and cells, don't you?

A. They have two exhaust fans in the ceiling of the third floor or the second floor of the jail.

Q. In addition to these facilities that the defendant had in his cell for water and a commode, a shower was available to the prisoner, wasn't it?

A. It was.

Q. And if a person requested a shower, you would allow him to take one, wouldn't you?

A. Yes, sir.

Q. And there was running water, and the showers were overhead?

A. That's right.

Q. And in fact one time while Davis was in custody between the period of the 21st of September, 1959, and October the 6th, 1959, he did take a shower or bath, didn't he, outside of his cell?

A. Yes, sir. I got him a towel and a bar of soap, and he took a bath.

Q. Now, was there anything different between Cell 92 where Davis was put, according to the Arrest Record and according to you, when he came up to jail—was there [fol. 43] anything different from that cell and any other cell in the jail?

A. It was not.

Q. Was it any more isolated than any other cell?

A. It was not.

Q. They are all just side by side, aren't they?

A. That's right.

Q. And you don't know that he was ever moved from Cell 92, do you?

A. I do not. Not to my knowledge, he wasn't.

Q. Now, you were not on duty at night during this period of time from the 21st of September, 1959, to October 6, 1959?

A. No, sir.

Q. And you do not tell the Court that Davis was ever taken from his cell at night and questioned by anybody, do you?

Mr. Nivens: We object to that.

The Court: Well, if he knows.

By the Court:

Q. Do you know or do you not know whether he was at night?

A. I do not know.

The Court: Very well.

By Mr. Downs:

[fol. 44] Q. Now, Mr. Ross, the Defendant Davis was fed the same fare that other prisoners in the jail received?

A. That's right.

Q. And what was he fed during this period of time?

A. Well, we get those ready-made sandwiches. We fed him twice a day two sandwiches, say, between 10:30 and 11:30 and between 4:30 and 5:30.

Q. Yoy mean two sandwiches each time or four sandwiches a day?

A. That's right.

Q. Did Davis ever complain to you about being hungry?

A. I don't remember it. He never complained about anything to my knowledge.

Q. Did he ever request that you get him any food other than these sandwiches you were feeding him?

A. Not to me, no, sir.

Q. And did you observe his appearance between the 21st of September, 1959, and October 6, 1959, from time to time?

A. Yes, sir. I saw him every day that I was on duty.

Q. And did you detect in your observation that he was undernourished in any way?

A. No, sir, I did not.

Q. Don't you know, Mr. Ross, that one of the reasons that Davis was kept in the city jail from the 21st of September, 1959, to October 6, 1959, was that he was an escaped [fol. 45] prisoner from the North Carolina Prison Department——

Mr. Nivens: Objection.

Q. —and that the authorities did not want to be transferring him back and forth across Alexander Street to the county jail?

The Court: Objection overruled

A. That was my understanding of the reason he was kept there.

Q. In fact you know that in the Mecklenburg County jail there is no place whatsoever to privately talk with anyone or to interrogate a prisoner; isn't that correct?

A. That's correct.

Q. And in the Detective Bureau of the City Police Department, which is located next to the jail itself, they do have interrogation rooms?

A. That's right.

Q. And it is just a short distance from the door of the jail into the Detective Bureau; isn't that correct?

A. That's correct.

Q. Now, on Sundays between the period of the 21st of September, 1959, and October 6, 1959, state whether or not you had any visitors from churches, universities, schools, or anyone else coming in to hold services for the various prisoners there?

A. We did.

[fol. 46] Q. Did you deny any one of these people who came in there during that period of time the permission to see Elmer Davis or any other prisoner in there?

Mr. Nivens: We object to that, Your Honor.
The Court: Read the question, please.

(Last question read by Reporter.)

The Court: Objection overruled.

A. I didn't deny anyone.

Q. Will you tell the Court whether or not these people that would come in from time to time, especially from Bob Jones University, would bring along small booklets containing the various scriptures?

A. They did.

Q. And would they give these scriptures to the prisoners?

A. Yes, sir.

Q. And in fact at the time Davis went in to see Lieutenant Coy Sykes, he was carrying a small portion of one of these various scriptures that had been distributed by one of the these religious groups, wasn't he?

Mr. Bell: We object to that, Your Honor.
The Court: Well, if he knows. Do you know?
The Witness: I don't know.

Q. Did any one of Elmer Davis's family ever come to the jail to see him while you were there?

A. No, sir.

[fol. 47] Q. Did anyone ever come to the city jail between the 21st of September, 1959, and October 6th, 1969, and request to see Elmer Davis and you refuse them permission to see him?

A. No, sir.

Q. Have you ever seen the lady in the blue dress seated just behind Mr. Nivens?

A. Not to my knowledge I haven't.

Q. Do you know whether or not between the 21st of September, 1959, and October 6, 1959, that the person by the name Eloise Sadler came to the city jail and requested to see Elmer Davis?

A. To my knowledge she did not, not while I was on duty.

Q. Did Elmer Davis at any time while he was in Cell 92 and under your custody during the daytime hours between the 21st of September, 1959, and October 6, 1959, request to use the telephone?

A. He did not.

Q. Did he ever ask you to call anyone for him?

A. He did not.

Q. During this period of time?

A. He did not.

Q. The fact of the matter is, Mr. Ross, the defendant in this case, Elmer Davis, was treated just like any other prisoner, wasn't he?

[fol. 48] Mr. Bell: We object to that. He doesn't know.

The Court: (To the witness) You must restrict your answer to your own knowledge. Objection Overruled.

A. I treated him the same as I would any other prisoner, yes, sir.

Mr. Downs: You may come down.

Redirect-examination.

By Mr. Bell:

Q. You just stated he was kept there longer than anybody you knew of?

A. Yes, sir.

Q. And that he was fed cold sandwiches longer than anybody you had ever known; isn't that right, Officer?

A. That's right.

Q. And he had water in his cell, he had hot water to drink, didn't he?

A. He had water in the cell.

Q. Yes, hot water?

A. Spigot water; it's not hot water.

Q. How many people do you see a day, Mr. Ross, when you are on duty?

A. How many people or how many prisoners?

Q. About how many people? You see hundreds, don't you?

[fol. 49] A. I have no idea.

Q. You see hundreds, don't you?

A. Beg pardon?

Q. You see me every day, don't you?

A. Practically every day.

Q. You see hundreds of people every day, don't you?

A. I imagine it's hundreds, yes.

Q. And this woman could have come there and you wouldn't even have known it; isn't that right?

A. If she had asked to see Elmer, I would have known it.

Q. Why?

A. Because no one ever asked to see him.

Q. I say you would have known her?

A. I don't know whether I would have known her or not.

Q. That's right. She could have come there and you wouldn't have known her?

A. I wouldn't have known her, no. I wouldn't have known who she was.

Q. And I'll ask you, Mr. Ross, right now if you don't know many people come there to see prisoners and the only way they can see them they have to go off and get a lawyer and come there; isn't that right?

Mr. Downs: I object to that.

Q. Isn't that right even today?

Mr. Downs: Objection.

[fol. 50] The Court: Well——

Mr. Bell: Your Honor, that is very important to this case. For the purpose of the record I would like to have it in there.

The Court: How is it material what was done to other people at other times? You can ask him anything that was done in relation to the Petitioner, Elmer Davis.

By Mr. Bell:

Q. You have known me to come up there with people to see folks, haven't you?

Mr. Downs: Object to that.

A. That's right.

Q. After they have been turned away and after they have been refused to see them themselves?

Mr. Downs: Objection.

The Court: Objection sustained.

Mr. Bell: Your Honor, I would like that to be included in the record.

The Court: The request is disallowed. We do not want to encumber the record with what I consider to be an irrelevant matter. I repeat: you can ask him about anything that has any relation to the Petitioner, Elmer Davis, or his treatment while he was an inmate of the city jail or any [fol. 51] other information that this man may have with respect to him.

Q. Mr. Ross, how many jailers are on duty during the day?

Mr. Downs: We object to that. He has answered it.
The Court: Overruled.

A. There are two at all times.

Q. Two at all times. What are these two jailers for?

A. It very near takes that many to keep up the job.

Q. And sometimes one of you are out during different times of the day and the other one is in?

A. Well, there is one there all the time, but just two on duty.

Q. Well, sometimes one is out and the other one is in, isn't that right?

A. Just how do you mean by "out"? You mean out of the building?

Q. Well, you go out to lunch?

A. No, I do not. I bring my lunch with me right there in the jail.

Q. Well, you don't stay in the jail at all times, eight hours every day?

A. Unless I go downstairs to get an Arrest Sheet.

Q. Well, when you go downstairs and other places, you leave the other jailer there?

[fol. 52] A. That's right.

Q. And there's a possibility somebody came up there while the other jailer was on duty?

A. That's right.

Mr. Downs: Objection.
The Court: Overruled.

Q. And you don't know whether anybody called for Elmer Davis or not. The only thing you can say is that they didn't ask you to see him?

A. That's right.

Q. That's right. Now, you say there are two jailers on each shift?

A. That's right.

Q. And you have three shifts?

A. That's right.

Q. When do you have lunch?

A. When I get a chance to eat.

Q. Well, you don't have any specific hour?

A. No, I do not.

Q. Well, when do you usually eat, Officer?

A. Well, sometimes I start at 10:00 o'clock and get through at 1:00.

Q. You do what?

A. I start at 10:00 o'clock in the morning, I answer the phone and eat a sandwich, and sometimes it takes until [fol. 53] 1:00 o'clock in the evening before I finish.

Q. Sometimes you go down to get you a cup of coffee?

A. I do not.

Q. Or a Coca-Cola?

A. I get a Coca-Cola.

Q. And that's way downstairs, isn't it?

A. That's downstairs.

Q. And you stay down there and drink it, don't you?

A. Sometimes, yes.

Q. Then you make trips in different parts of the jail?

A. Oh, yes.

Q. And the other jailer is out front when you do that?

A. That's right.

Q. So it's possible for this woman to have asked some other jailer to see Elmer, isn't it?

A. It's possible.

Mr. Bell: That's all.

Recross-examination.

By Mr. Downs:

Q. During the period, September 21, 1959, to October 6, 1959, how many jailers were on duty during your period of duty?

A. Two. And sometimes on Sundays there were three of us.

Q. And what was the name of the other jailer?
[fol. 54] A. I can't be positive.

Mr. Downs: Come down:

JESSE JAMES, called as a witness by the Petitioner, having been duly sworn, testified as follows:

Direct-examination,

By Mr. Nivens:

Q. Your name is Mr. Jesse James?
A. Yes, sir.
Q. Mr. James, I believe you were Chief of Police in the City of Charlotte during the period of September 21, 1959, through October 6, 1959?
A. Yes, sir.
Q. Are you familiar with the alleged murder of Mrs. Foy Bell Cooper on the 20th of September, 1959?
A. Yes, sir.
Q. Now, Chief, I believe that the entire police department, including the Detective Division, was coordinated under your leadership; is that right?
A. Yes, sir.
Q. Now, when did you first become aware that Elmer Davis was implicated in this matter?
A. I cannot remember.
Q. Can you give us some reasonable period of time?
[fol. 55] A. I believe that Captain McCall told me that a suspect had been developed in the case and that he felt that this was the man responsible for the crime; and I cannot recollect how many days or right after when he was picked up or what, I honestly don't remember.
Q. You do know that he was picked up in Belmont?
A. Yes, sir.
Q. And that is twelve miles away from Charlotte?
A. Yes, sir.
Q. And that is also in Gaston County?
A. Yes, sir.
Q. And he was picked up in Belmont because of the fact that he was an escaped convict?

A. Yes, sir.

Q. Now, did you ever at any time prior to his coming to Charlotte get permission from the state penal authorities to bring Elmer Davis to Charlotte?

A. I did not myself.

Q. Do you know whether anyone in the police department had permission from the State Prison Department prior to his coming to Charlotte?

A. I do not know.

Q. Chief, at that time was it normal procedure to get permission from the State Prison Department when an escaped prisoner was apprehended in another county?

[fol. 56] Mr. Downs: Object to "normal procedure."

The Court: Well, he says at that time. Objection overruled.

A. If I understand your question correctly, if we had an escaped convict and we wanted to talk to him, was it the procedure to call the state authorities and ask them if we could retain this man in our custody for so long; is that what you mean?

Q. Or to bring him to the county from another county?

A. I don't believe that I have ever requested this from the state, so I wouldn't know.

By the Court:

Q. Just one moment. I wish you would clarify your answer. You say you have never requested what?

A. I have never requested, Your Honor, from the prison authority permission to retain a prisoner in my custody over a period of time for the purpose of interrogation or holding for investigation.

By Mr. Nivens:

Q. Let me ask you this, Chief: Have you ever in your experience with the Police Department in Charlotte gone into another county, apprehended a prisoner for the purpose of investigation, and brought him to the county in which you were officially hired?

A. Not to my knowledge.

[fol. 57] Q. Now, you say you do not recall just at what point you became familiar with his arrest?

A. No, sir. I do not.

Q. But you are familiar with the procedure used there in the local Police Department in Charlotte.

A. Yes, sir.

Q. Now, let me ask you this question, Chief: Is it not your policy that in matters of this nature that you would handle them yourself, or did you delegate these duties to other members of the department?

A. Would you clarify that a little further, please?

Q. In other words, this I take it, to you was a novel situation?

A. As far as the murder itself is concerned?

Q. No, not the murder itself. I mean the handling of this Elmer Davis case because of the fact that he was apprehended in another county, in an adjoining county?

A. I hope I understand you correctly. My thinking about it was the fact that Elmer Davis was an escaped convict, and he was in our custody primarily because he was a suspect in Mrs. Cooper's case; and I assigned this to Captain McCall and, therefore, it was in his hands, and I did not have any actual, firsthand knowledge except to know that the case was being handled, and I thought that they would do all right.

[fol. 58] Q. Now, Captain McCall was acting within his authority when he requested permission from the State Prison Department to hold Elmer Davis?

A. I do not know if he requested that, but if he did——

Q. Well, you were at the trial of this case when it was tried in the Superior Court of Mecklenburg County?

A. Part of the time, yes, sir.

Q. Do you recall that Captain McCall testified that he did at some point get permission from the State Prison Department to hold Elmer Davis?

A. I cannot recollect that part of it.

Q. Chief, I show you Petitioner's Exhibit No. 1. Are you familiar with this sheet?

A. I am familiar with this type of Arrest Record that we had in the Charlotte Police Department at that time.

Q. All right, sir, can you tell or will you tell the Court how many blanks like this are made out when a person is arrested?

A. According to Captain Yandle, there are three.

Q. What do they do with each one of those three sheets?

A. One is retained in the Records Division, one goes to the jail, and I don't recollect where the other one went.

Q. Now, what is the purpose, Chief, of sending one to the jailer?

A. The purpose is to inform the jailer the classification, [fol. 59] the type of arrest, and the type of individual that is being held in custody.

Q. Now, you will note it is written here: "Hold for Hucks & Fesperman re-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to use telephone." Now, what is the significance of that on a police report with regards to the jailer?

Mr. Downs: Objection.

The Court: Overruled.

A. The incarceration of a prisoner who is not an escaped convict or a felon, in my understanding of the law that this——

Q. I object to that. I just want you——

A. Well, I'm trying to answer this question. I want to be truthful with you. And I don't understand why this was ever put on there except for one reason: because he was an escaped convict. I never saw this until the day of the trial, until it was brought to my attention by Mr. Bell; I am not familiar with it being on any police record or any place where I had any part to play with unless the man was an escaped convict.

Q. Well, this was the first escaped convict that you had had experience with during your administration, was it not, that was picked up in another county?

[fol. 60] A. Yes, sir.

Q. Now, do you know what officers picked up the prisoner?

A. No, sir, I couldn't tell you who picked him up.

Q. Now, let me ask you this other question: Chief, normally a pencil or a pen copy of the Arrest Sheet is made out, is it not?

A. My instructions to the jailer was that when the man was brought in arrested that he be searched, and we had typewritten copies made out in the Records Division showing the date of arrest so that it could be used for posterity or whatever use they might have of it.

Q. Isn't it also normally true that the person who makes out the Arrest Sheet signs it?

A. Yes, sir.

Q. Is there any signature on that Arrest Sheet?

A. I don't see any, no, sir.

Q. Chief, to your own knowledge do you know whether or not anybody had instructed any of the subordinate officers to put this information on the Arrest Sheet?

A. I don't have any knowledge of why or what this is all about.

Q. Now, Chief, let me ask you this: Do you know that Elmer Davis was held in jail sixteen days before he confessed to this purported murder?

[fol. 61] Mr. Downs: Objection.

The Court: What is the basis of the objection?

Mr. Downs: Well, we have stipulated that he was held in jail sixteen days before he confessed.

The Court: I understand. He is asking him if he knew that. Objection Overruled.

A. Only when I went to Court in Superior Court did I know the number of days that he was incarcerated.

Q. Chief, what type of food is given to the prisoners that are normally held in the city jail?

A. Sandwiches?

Q. How many sandwiches?

A. Two sandwiches at each meal two times a day.

Q. What about liquids?

A. I could not tell you.

Q. Now the other, normal run of prisoner that is held in the city jail is held there for short periods of time; isn't that right?

A. Yes, sir.

Q. And it is commonly known and called an overnight jail, isn't it?

A. I don't know about that terminology.

Q. Well, now, hasn't it happened in several instances and in this instance that there were a number of other prisoners that were being held along with Elmer Davis in the [fol. 62] city jail?

Mr. Downs: Objection.

The Court: Overruled.

A. It was not uncommon for us to have someone under arrest that be incarcerated there for two or three or four days while we were talking with them in reference to a case.

Q. And these other prisoners who were probably there for short periods of time, weren't they in something that we commonly call in Charlotte a bull pen?

A. A bull pen in my definition is an enclosed area maybe as large as this room depending upon the size of the jail. The bull pen that we had in Charlotte was a waiting room which was outside the main entrance of the Courtroom, and to my knowledge no man was ever kept in this bull pen unless he was waiting to go out to Court or waiting to go across the street to the county jail.

Q. Let's say that someone was apprehended and being held for public drunkenness, weren't they usually held in a spacious room on the first floor of the jail?

A. They were supposed to have been removed of all material on their persons.

Q. I didn't ask you that.

A. Well, I am trying to answer, sir, so that I can tell you. They were taken to a cell and placed in it so that they would not do harm to themselves for a period of approxi-
[fol. 63] mately four hours.

Q. I'm not relegating this portion directly to drunken people. Any type of prisoner normally held for a short period of time, wasn't he held in a spacious room?

A. I couldn't say. I couldn't answer that.

Q. Well, you do know in the city jail in Charlotte they do have two spacious rooms, don't you?

A. To my knowledge, my instructions were to place all of these people in cells when they were arrested. It's very possible that one of these people could have been placed in the bull pen, as you said, or any other place in the jail without my knowledge. My instructions and my feeling about the incarceration of a prisoner are as I just told you.

Q. Well, I'm not talking about your feeling, Chief. We want to know exactly what happened.

A. I'm trying to tell you.

Q. Let me ask you this: Weren't there times when as high as ten or fifteen prisoners were held in a big room in the city jail in Charlotte?

A. It is very possible that on a Friday or Saturday night

when we had more than our jail would take care of. On numerous occasions we have had a full house.

Q. Well, now, you are not trying to say, Chief, that you would normally take a person who was accused of public drunkenness and put him in a cell for a substantial period [fol. 64] of time, are you?

A. I would put him in there until he made bail or went through the due process of law and was released.

Q. Let me ask you this, Chief: If you had known that the information that is there on that Arrest Sheet had accompanied Elmer Davis to his cell, what would you have done about it?

Mr. Downs: Objection.

The Court: Well, how can that be competent?

Mr. Bell: Your Honor, for the purpose of showing that the administration of the police department does not condone the type of treatment that Elmer Davis received while he was incarcerated and being investigated.

The Court: Well, how is that relevant to this inquiry? Isn't the treatment that he actually received the question?

Mr. Bell: We want to show it was a violation of policy that these men who were investigating him had preconceived ideas that he was guilty and that they intended—it was a planned thing, a planned procedure, to hold him, to question him and hold him under circumstances that would amount to force.

The Court: Very well. Objection Overruled. Go ahead, sir.

[fol. 65] A. (Continuing) If this man was being arrested to be held for this case, I would have been very upset if he had no previous record. Inasmuch as he was an escaped convict, I would have asked them what was the purpose of placing this do not allow anyone to see Davis or allow him to use the telephone. To be perfectly honest with you, why put it in writing when you can do the same thing verbally. I mean there is no question about it. The question is that each individual is allowed due process of law. And if they had been asked in any way or if I had been asked for anyone to see Elmer, they would have been given permission. Nobody asked to my knowledge.

Q. Then, Chief, you agree that this Petitioner was held in contravention to his constitutional rights?

Mr. Downs: Objection.

A. No, sir, I do not.

Mr. Downs: I will withdraw the objection.

Q. Are you familiar with North Carolina General Statutes 15-45, 46, and 47? No, it is 46 and 47.

A. You will have to read it to me. I have been out of law enforcement for a good number of years now.

Q. (Handing witness General Statutes of North Carolina) Read 46 and 47.

A. Yes, sir, I am familiar with this.

Q. Now, will you read it for the purpose of the record? [fol. 66] A. "Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communications with counsel or friends. Upon the arrest, detention, or deprivation of liberties of any person by an officer in this state with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him; and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such person to communicate with counsel and friends shall not be denied. Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the Court."

Q. Now, read 15-47.

A. 15-47 is what I just read.

Q. Did you read 15-46?

A. No, sir.

Q. Well, will you read that.

A. "Procedure on Arrest Without Warrant: Every person arrested without warrant shall be either immediately [fol. 67] taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison and as soon as may be taken before such magistrate who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

Q. All right, sir. Do you know of your own personal knowledge when Elmer Davis went before a magistrate?

The Witness: May I explain my answer, Your Honor?

Q. Well, do you know?

The Witness: I don't want to say yes or no without being given the opportunity to——

The Court: Well, if you can answer the question yes or no, then you may explain it. If you can't answer it yes or no, say so.

A. I do not have any knowledge, no, sir.

Q. You don't have any knowledge of when he went before a magistrate?

A. No, sir.

Q. Well, do you know this. Do you know whether or not he was represented by counsel at the time he went before a magistrate?

A. I have no knowledge.

Q. Now, you have this Arrest Sheet there before you?

A. Yes, sir.

[fol. 68] Q. And normally if Elmer Davis had had counsel, it would have been on the record, would it not?

A. Not to my knowledge.

Q. Well, what does that Arrest Sheet say about the preliminary hearing?

A. This gives the final disposition of the case.

Q. Does it say anything about preliminary hearing?

A. Not to my knowledge.

Q. You don't see written on there "preliminary hearing waived"?

A. I'm looking but I don't see it. If it's on here, somebody will have to show it to me.

Q. Do you see PHW written on there?

A. What location?

Q. Do you see here at the bottom of this sheet "PHW Bound over to Superior Court"?

A. Oh, yes, I see what you are talking about.

Q. What does that mean?

Mr. Downs: Objection.

The Court: If he knows what it means, objection overruled.

A. It means bound over to Superior Court.
Q. What does the PHW stand for?
A. I don't know.
Q. Well, now, Chief, don't you know that this boy waived [fol. 69] preliminary hearing?
A. I cannot recollect.
Q. You cannot recollect?
A. It's been four years; I can't remember.
Q. Well, do you know that he was only escorted by one of the members of the police department at the time of the preliminary hearing?
A. I do not remember.

Mr. Nivens: That is all.

Cross-examination.

By Mr. Downs:

Q. Chief, you do know that Elmer Davis was being held in custody for the crime of rape and murder, don't you?
A. Yes, sir.
Q. And both of those crimes are capital crimes?
A. Yes, sir.
Q. Either one of them?
A. Yes, sir.
Q. Were you notified, Chief James, on October the 6th that Elmer Davis had signed a written confession in this matter?
A. I believe on the afternoon of October the 6th, late, somebody told me that he had made a confession.
Q. What did you do when you heard that?
[fol. 70] A. I went up to Captain McCall's office and I met him, I believe, out in the little corridor, and I asked him if it was true that Davis had made a statement in reference to the Cooper case, and he said——

Mr. Nivens: Now, I object to that, Your Honor.

Q. Let me ask you this: You testified during the time the confession was sought to be disqualified in Superior Court, didn't you?
A. Yes, sir.
Q. I ask you if Mr. Walker, who was the Solicitor, asked you this question on Page 150 of the transcript——

Mr. Nivens: Your Honor, I am going to object to that on the ground that it is hearsay.

The Court: Well, have you not been using the same transcript to ask witnesses to test their recollection as to the questions and answers?

Mr. Nivens: Yes, sir. But every witness that I asked about was present. Mr. Walker is not here.

The Court: Is this a question asked of this witness by Mr. Walker?

Mr. Downs: Yes, sir. By Mr. Walker of this witness.

The Court: Objection overruled.

By Mr. Downs:

Q. Chief James, I ask you if Mr. Walker asked you this [fol. 71] question: "Sometime after signing of the statement by the defendant, did you talk to him?" Did he ask you that question?

A. Yes, sir.

Q. I'll ask you if you didn't answer: "On the afternoon that I went upstairs to see Captain McCall it is my understanding that they had a break in the case and so forth"?

A. Yes, sir.

Q. "And I went upstairs to talk to Captain McCall around 5:00 o'clock in the afternoon."

A. Yes, sir.

Q. "And I wanted to talk to the man if he had." Is that right?

A. Yes, sir.

Q. "I wanted to see if everything was all right."

A. Yes, sir.

Q. "And I saw Captain McCall out in the office and I believe Lieutenant Sykes was there"?

A. Yes, sir.

Q. "And Mr. Hucks and Mr. Fesperman and several other detectives were around"?

A. Yes, sir.

Q. "And I went in the office where Elmer Davis was seated"?

A. Yes, sir.

[fol. 72] Q. "And I told Elmer, I said, 'Elmer, I am Chief James; I am the Chief of the Police Department'"?

A. Yes, sir.

Q. Did you answer that question asked by Mr. Walker in that way?

A. Yes, sir.

Q. I'll ask you also if Mr. Walker didn't further ask you: "Who was present at that time?"

A. Yes, sir.

Q. And you answered the following: "To the best of my knowledge Captain McCall and Lieutenant Sykes and Mr. Hucks and Mr. Fesperman"?

A. Yes, sir.

Q. "And that is the best I can remember was there"?

A. Yes, sir.

Q. "I asked Elmer, I said, 'Elmer, it is my understanding that Lieutenant Sykes prayed with you and so forth, and you got this thing off your chest.'" Did you say that?

A. Yes, sir.

Q. "And he said, 'That is right, Chief.'"

A. Yes, sir.

Q. "I said, 'Well, do you feel better about it?'"

A. Yes, sir.

Q. "And he said, 'I feel a lot better about it.'"

A. Yes, sir.

[fol. 73] Q. "And I said, 'Well, there is one thing that I want to understand, and that is, in this Police Department I do not want anybody hurt or harmed.'"

Mr. Nivens: I object to that question.

Q. Did you answer the question that way?

A. Yes, sir.

The Court: Just one moment. What is the basis of that objection?

Mr. Nivens: I object to it because of the fact that he is the Chief of Police and is exonerating himself. That is just like self-serving evidence. This is the type of case that certainly—It's just like a nominal criminal case, to tell you the truth, in this respect: that a self-serving declaration would be inadmissible. Now the Police Department is attempting to exonerate themselves; so self-serving declarations made by them, it certainly seems to me, would be inadmissible.

The Court? Haven't you already offered as your evidence in this case this identical record? Hasn't it been

admitted in evidence by this Court at this hearing this morning?

Mr. Nivens: Yes, sir. All right.

The Court: Objection overruled.

By Mr. Downs:

[fol. 74] Q. "I do not want anybody hurt or harmed in any manner in any case no matter how important it is to the public." Did you tell Mr. Walker that?

A. Yes, sir.

Q. "And to the Police Department"?

A. Yes, sir.

Q. "'I would like to know if you have been mistreated in any way' or any officer done anything to him that would cause him to think that he made any statement to them against his own free will." Did you tell Mr. Walker that?

A. Yes, sir.

Q. "And I said that and sat down, and at that time I was looking right across to him across the room; and he said, 'Chief, I have been treated all right.'"

A. Yes, sir.

Q. "And I said, 'Well, if there is anything you would like to say to me, I would be glad to hear it.'"

A. Yes, sir.

Q. "And he had nothing to say, at which time I left the room and went back downstairs"?

A. Yes, sir.

Q. Is that the very man, seated over yonder in the blue suit, who has been identified as Elmer Davis, the Petitioner in this case, that made that statement to you: "Chief, I have been treated all right"?

[fol. 75] A. Yes, sir, he is.

Q. Now, the city jail in which Elmer Davis was held between the 21st of September, 1959, and October the 6th, 1959, was inspected from time to time by different departments of this state; isn't that correct?

A. Yes, sir.

Q. And it was also from time to time inspected by the Grand Jury of the Superior Court of Mecklenburg County?

A. Yes, sir, on numerous occasions.

Q. And I'll ask you between the period of the 21st of September, 1959, and October the 6th, 1959, if the city jail

of the City of Charlotte, in which Elmer Davis was held, was not approved in all respects?

A. Yes, sir, to my knowledge.

Q. Now, are you familiar with the Mecklenburg County jail on the fourth floor of the Court House?

A. Yes, sir.

Q. Have you visited it many times?

A. No, sir, not on many, many occasions.

Q. Well, were you familiar with it between the period of the 21st of September, 1959, and October the 6th, 1959?

A. Yes, sir.

Q. Chief James, do you have an opinion satisfactory to yourself as to whether or not the city jail in the City of Charlotte, between the period of September 21, 1959, [fol. 76] through October 6, 1959, was superior in quality to the Mecklenburg County jail?

A. It is my opinion——

Mr. Bell: Objection.

The Court: Just a moment. Well, now, that calls for an opinion——

Mr. Nivens: A conclusion.

The Court: —which gets into a realm concerning which this witness may or may not be expert. Do you contend that he is an expert in the quality of jails generally?

Mr. Downs: Your Honor, the only reason I asked this question is that all through these proceedings, it seems to me, the contention is that he would have gotten—and I think the question was asked this morning—that he would have gotten much better treatment had he been over in the Mecklenburg County jail. That's the reason I asked the question.

The Court: Well, but you are asking it in a form which calls for an opinion and a conclusion of this witness. I think it would be better to let him describe, if you desire to go into it, the two jails with respect to any particular features of the two that you wish to direct his attention to; and then the conclusion can be drawn by the Court as [fol. 77] to the relative superiority or inferiority. Objection sustained as to the form of the question.

By Mr. Downs:

Q. Chief, you do know that the Mecklenburg County jail which is across the street from the city jail, across Alexander Street, in the City of Charlotte, does not have any place whatsoever to interrogate the prisoners; isn't that correct?

A. Yes, sir.

Q. But the city jail and the City Police Department is located next door to the Detective Division?

A. Yes, sir.

Q. And the Detective Division during the period of September 21, 1959, to October 6, 1959, had conference rooms where prisoners and other people could be interrogated?

A. That's correct.

Mr. Bell: Objection.

The Court: Overruled.

By the Court:

Q. For my information is this City Detective Bureau and these interrogation rooms to which you refer in the same building as the city jail?

Mr. Downs: Yes, sir.

A. It is adjacent to it, Your Honor. There's a little corridor right at the jail that goes into the Detective [fol. 78] Bureau; it's very convenient.

The Court: Very well. You may continue.

Mr. Downs: That is all.

Redirect examination.

By Mr. Nivens:

Q. Now, Chief, you say that this city jail is equipped with facilities for interrogating prospective criminals, is that right?

A. No, sir, I did not say that.

Q. Well, the only thing that the city jail has that the county jail doesn't have with regards to offices is that they have office spaces for the various departments; isn't that right?

A. I don't follow you, I'm sorry.

Q. I want now to ask you do you have any specific room in the City Police Department of Charlotte for interrogating and investigating witnesses?

A. Yes, sir, we do.

Q. Where is that room, please, sir?

A. That is in the Detective Bureau upstairs.

Q. It's in the Detective Bureau upstairs?

A. Yes, sir. And we have some downstairs in the Youth Bureau.

Q. Well, now, that room is also used as an office, isn't [fol. 79] it?

A. The interrogating room in the Detective Bureau?

Q. Yes, sir.

A. They are called interrogation rooms.

Q. Well, now, it's used as an office, isn't it?

A. Not the interrogation rooms that we have there to my knowledge.

Q. Well, let me ask you this: Are you saying that they don't have any place in the county jail in Mecklenburg County where a witness can be interrogated?

A. No, sir, I'm not saying that.

Q. Well, then, there is absolutely no difference. A rose by any other name would smell as sweet, wouldn't it?

A. No, sir. An interrogation room should be void of all materials so that you can talk to a man in complete quiet and keep his attention.

Q. Well, now, let me ask you this: When attorneys go over in the county jail to talk to a witness, where do they go?

A. I couldn't tell you, sir, unless it's the anteroom to the Courtroom.

Q. Well, Chief, don't you know that they have a special place provided in the county jail where attorneys can talk with clients privately who are incarcerated?

A. No, sir, I have no knowledge of that, no, sir.

[fol. 80] Q. Well, you don't deny that they have such a room, do you?

A. I have no knowledge. I'm sorry.

Q. I say you don't deny it?

A. If you say so, I'd say yes, sir.

Q. Now, let me ask you this: You became concerned about this boy's treatment a bit in retrospect, did you not?

The Witness: I would like to preface my remarks, Your Honor, if I am going to answer that question.

Q. Well, let me put it this way: Why were you not concerned about the way this boy was treated prior to his confession?

A. I cannot answer yes or no unless I am given a right to explain; I think I have that right.

Q. I'm not talking about——

The Court: You may explain your answer.

Q. Now, I'm asking you this question. Now, get my question. Why did you not concern yourself prior to this confession with the manner in which this Petitioner was treated?

A. I was Chief of Police of a city of a hundred and sixty-some thousand people fixing to annex another thirty-some thousand and thirty-some square miles. I was concerned [fol. 81] about traffic violations, people killed in traffic accidents, and other things going on just as serious. It was always my concern and always has been and always will be that each individual in this country be allowed his due process of law. Why didn't I go up to see him before? Because I knew he was an escaped convict. I wanted to make sure he was not mistreated, but I didn't look upon him him as a man with all the rights of the other individual. I knew his rights would not be taken away from him. I had talked with Captain McCall; I had confidence in him; and each division of the Police Department is run by a superior officer. The Chief of Police does not have time to get into detail with each case. When they came to me and told me there was a break in the case—I have done this on numbers of occasions where a man has confessed to a crime—I have always asked him, "Were you mistreated?" If the man was mistreated in some way, I wanted to know why. I am serious about this thing; this is a very serious point.

Q. Well, Chief, your dereliction, if any, with regards to Elmer Davis was simply because of the fact that he was an escaped convict; is that what you are saying?

A. No, sir. I have no dereliction of my duty as far as Elmer Davis is concerned.

Q. Well, this was the most important crime that had been committed in Mecklenburg County and the most serious crime that had been committed in Mecklenburg County at that time?

[fol. 82] A. Sir, any murder case is a serious crime.

Q. But I mean this was the most serious. Nobody had been held for murder; no other murder had been committed approximately around that time, had there?

A. I'd have to check the record, I don't know.

Q. Well, you would remember——

A. As far as its being important, yes, sir, it was very important.

Q. This was a very important case?

A. Yes, sir. Yes, sir, very important.

Q. And yet you waited until after he had confessed to go back and see if he had been treated right?

A. That's right.

Q. Now, let's get back to the inspection of it. Now, Chief, is it your opinion or is it your conclusion that an escaped convict doesn't have any constitutional rights?

A. No, sir.

Q. It's not?

A. No, sir. He has his rights.

Q. Well, what did you mean by the statement that you made a few minutes ago in the record when you stated that you knew this boy was an escaped convict?

Mr. Downs: Your Honor, I object to this. This witness was put on the stand by Mr. Nivens, and he has started [fol. 83] to cross-examine him on numerous occasions. I haven't objected until this time.

The Court: Very well. Well, I am going to let him continue his examination. Go ahead.

Q. What did you mean, Chief, when you made the statement that you knew he was an escaped convict and you were not concerned?

A. I wasn't concerned about the regular procedure of law about whether he was going to make bond or various other things—an escaped convict. Usually the man will be incarcerated until he is picked up, and so forth, by the proper authorities. I didn't look upon him as a man who

had been arrested out here for driving drunk or a traffic violation: that's what I meant. In other words, I meant for his constitutional rights to be protected.

Q. Well, Chief, the more serious a crime, the greater the chances of impinging constitutional rights, aren't they?

A. Each officer knows his responsibility; he takes an oath and he should live up to it.

Q. Well, isn't it your responsibility to see that these officers live up to that oath?

A. To the best of my ability, yes, sir.

Q. Let me ask you this, Chief: At the time when Elmer Davis made the purported statement that you gave a few minutes ago that he was being treated all right, where was he?

[fol. 84] A. In Captain McCall's office, to the best of my knowledge.

Q. Now, how large is that office?

A. Approximately, I guess about eight by ten or maybe a little smaller than that, maybe eight by eight.

Q. It's a small place, isn't it?

A. Yes, sir.

Q. How many officers were there?

A. Right in the office itself I believe only Lieutenant Sykes and Captain McCall and myself were right there at that time.

Q. Well, what officers were nearby?

A. Out in the hall I believe Mr. Hucks, Mr. Fesperman, and Mr. Gardner.

Q. Now, were these men armed?

A. They are always armed, sir.

Q. They are always armed?

A. Yes, sir.

Q. Now, were there any colored officers around?

A. No, sir, not to my knowledge.

Q. How many colored policemen did you have on the police force in Charlotte at that time?

Mr. Downs: Objection as being immaterial.

The Court: How is that relevant to this inquiry?

[fol. 85] Mr. Nivens: We will withdraw that question, Your Honor.

Q. Now, Chief, let me ask you this: Now, you spoke about the fact that the Charlotte city jail had been ap-

proved by various governmental agencies and the Grand Jury in Charlotte?

A. Yes, sir.

Q. But was it not or is it not true that these governmental agencies knew what the purposes of that jail was?

A. Yes, sir.

Q. And did you ever tell them or was any member of these governmental agencies ever advised that it was equipped to keep a man for sixteen days?

A. Not to my knowledge, no, sir.

Q. And it is not equipped to keep a man for sixteen days, is it, Chief?

A. Yes, sir, as far as I'm concerned it is.

Q. Well, you don't have a kitchen there, do you?

A. Can have hot food brought in to him.

Q. Hot food?

A. Yes, sir.

Q. By whom was hot food brought to Elmer Davis?

A. Not any to my knowledge; I don't know; I can't say.

Q. And basically you say——

A. I'm working on the premise you said "can" it be [fol. 86] used. I say yes, sir, it can be used.

Q. Well, you know what we are talking about, Chief. You know we are talking about this specific case, don't you?

A. Well, you asked me the question: can it, and I assume——

Q. Well, let me ask you this: During the time Elmer Davis was in there, did you have any facilities for the preparation of hot food?

A. No, sir.

Q. And he was not outside of his cell during the time that he was being fed, was he?

A. I couldn't answer that.

Q. Well, let me ask you this: I believe some of the officers have stated that quite often that the prisoners would eat one sandwich and leave another one, an extra one, for somebody else to eat. Now, did you ever know of that situation occurring with regards to Elmer Davis?

A. I have no knowledge, no, sir.

Mr. Nivens: That's all.

(Luncheon recess: 1:30 P. M. until 2:30 P. M.)

Afternoon Session Wednesday, February 20, 1963

Mr. Nivens: Your Honor, I would like to ask counsel for the State whether or not they included in the records [fol. 87] that were brought here to the Federal District Court the order appointing counsel in this case.

Mr. McGalliard: Yes, I think we have a copy of it here somewhere.

Mr. Nivens: Your Honor, while he is looking for that, I would like to ask the attorneys for the State if they would be willing to stipulate that from the time Elmer Davis, Jr., was arrested on September 21, 1959, until the date of this order that Elmer Davis was without counsel.

The Court: Gentlemen, do you have the order to which counsel has referred?

Mr. McGalliard: I am having difficulty finding it.

Mr. Downs: If it please the Court, that would be in the regular Court papers of Mecklenburg County. We were not aware that they desired that document; we weren't put on notice. We brought the exhibits.

The Court: Does it appear anywhere in any of the records in the former proceedings in this matter?

Mr. McGalliard: I have a document signed by the Clerk which shows Mr. W. B. Nivens and Mr. Charles V. Bell as counsel of record in the course of this proceeding. I think somewhere I have a copy of the formal order of [fol. 88] appointment.

Mr. Nivens: Your Honor, we would like to get it in the record.

The Court: Very well. The Court will be at ease while counsel for Respondent attempts to locate the document.

Mr. McGalliard: Your Honor, I don't find it. Mr. Downs states that the original order would be on file in the Mecklenburg County Superior Court Clerk's office and that he has not brought it.

The Court: Well, does counsel for the Petitioner have a copy of the original order appointing counsel?

Mr. Nivens: No, sir, we do not, Your Honor, and I wonder if they would stipulate and we can get it into the record later by sending a copy to the Court? If they will stipulate that from the time he was apprehended

September 21, 1959, until the date of this order that he was without counsel.

The Court: All right, gentlemen, you have heard the inquiry.

Mr. Downs: Your Honor, we will not so stipulate.

The Court: All right.

Mr. Nivens: Your Honor, this request is made for the [fol. 89] express purpose that I went to the Court House to seek these records myself, and I was told by the person in charge of the records that there was nothing left in Mecklenburg County pertaining to Elmer Davis but the name. I believe Captain Yandle also went to the City Police Department. We probably can prove it otherwise, Your Honor.

The Court: Well, is there anyone present who is sufficiently familiar with the Court records of Mecklenburg County to show where this particular document now is? I don't know who is present as witnesses. Does the Petitioner have any witness under subpoena from the Clerk's office?

Mr. Nivens: No, sir.

The Court: Does the Respondent have anyone here representing the office of the Clerk of the Superior Court?

Mr. Downs: We do not.

The Court: Well, now, unless the matter can be satisfactorily determined as to the date of the appointment of that order, if that is material, I will permit you to issue subpoena duces tecum and get some representative of the Clerk's office here for the purpose of producing that document, if he has it, or furnishing such information as may be [fol. 90] at his command, if that is what you want.

Mr. Nivens: Yes, sir. Thank you.

Mr. Downs: Your Honor, we would like to make inquiry at this time. We have Dr. J. S. Nathaniel Tross of Charlotte here as a witness for the Respondent, and we would like to inquire as to whether or not we might put him up so that he will not have to be here overnight. It is apparent that this matter will run on over into tomorrow.

The Court: Does the Petitioner object to putting on Dr. Tross out of order?

Mr. Nivens: No, sir.

The Court: Very well. You may call him out of order.

DR. J. S. NATHANIEL TROSS, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. What is your name, please, sir?
A. J. S. Nathaniel Tross.
Q. Dr. Tross, what is your occupation?
A. Minister, editor, radio commentator.
[fol. 91] Q. Were you a minister of the Holy Gospel on or about October 6, 1959, and thereafter?
A. Yes, sir.
Q. Do you hold a doctor's certificate in theology?
A. Yes, sir.

By the Court:

Q. Excuse me a moment. What was the name of the church to which you referred?
A. China Grove, A.M.E. Zion.

The Court: Oh, I beg your pardon. I thought you asked him about the particular church.
Mr. Downs: No, sir.

By Mr. Downs:

Q. You were the minister of the China Grove A.M.E. Zion Church near Charlotte, North Carolina, on October the 6th and thereafter?
A. Yes, sir.
Q. You are a member of the colored race; is that correct, sir?
A. Yes, sir.
Q. On the evening of October the 6th, 1959, state whether or not you had occasion to see Elmer Davis, the Petitioner in this particular matter here?
A. Not in the evening; the morning of that date, Mr. Downs, before noon.
[fol. 92] Q. And what time was it, if you recall?
A. Oh, it must have been between 10:00 and 11:00.
Q. A. M.?
A. Yes, sir.

By Mr. Nivens:

Q. Just a minute. What was that? What was your answer to the question about what time it was?

A. It was the morning of that date.

Q. He asked you about what time.

A. Oh, it was between 10:00 and 11:00.

The Court: Now, that was October the 6th do I understand?

Mr. Downs: Yes, sir.

By Mr. Downs:

Q. Doctor, it was really October the 7th instead of October the 6th?

A. Yes, sir, there was some mistake——

Mr. Nivens: I Object to that, Your Honor.

The Court: Objection Overruled.

A. (Continuing) There was some mistake in the date when I testified first. I stated that it was the 6th, but it was the 7th.

Q. Dr. Tross, where was it that you saw Elmer Davis on October the 7th between 10:00 and 11:00 o'clock in the morning?

[fol. 93] A. In the room of the detectives.

Q. At the time you saw him was anybody else in the room?

A. No, sir. I went in, and those who were in charge asked me if I wanted to see him in private, and I said yes, and they left me with him.

Q. Did you confer with Elmer Davis, the Petitioner in this matter?

A. Yes, sir.

Q. And did you converse with him in relationship to whether or not he had been mistreated in any way?

A. Yes, sir.

Q. By the Police Department?

A. Yes, sir.

Q. And what did Elmer Davis tell you on that occasion, Dr. Tross?

A. He told me no, that his treatment was very fine and that everybody was courteous and kind to him and that further they asked him if he needed anything like cigarettes

or anything like that, and they were very deferential to him in that respect.

Q. Did you discuss with him at all his purported confession in this matter?

A. Beg your pardon?

Q. Did you talk with Elmer Davis at all about his purported confession?

[fol. 94] A. Well, I talked to him, but there are some things that we discussed that I didn't testify about; I shouldn't as a minister. Speaking in confidence with him, I should not unless compelled to do so by the Court.

Q. The only thing I am asking you now is: did you discuss with him his confession to this alleged offense?

A. I would like you to clarify that, Your Honor.

The Court: Counsel for the Respondent is asking you, as I understand it, whether or not during the course of your private conversation with the Petitioner, Elmer Davis, Jr., if you discussed with him any statements, admissions or confessions which he may have made.

The Witness: Just in part.

By Mr. Downs:

Q. How long were you with the Petitioner on this particular morning?

A. Beg your pardon?

Q. How long were you with him?

A. About an hour.

Q. Did any one of the policemen up there in the Police Department hurry you in any way in your conversation?

A. For about ten minutes or so I think Detective McCall came in for a short while, and Detective Sykes came in for a while and offered some cigarettes and wanted to know if [fol. 95] he wanted anything to eat.

Q. I am asking you now, though, Doctor, you say you talked with him for an hour. Did the Police Department in any way hurry you through your visit with him, or were you permitted to see him as long as you felt was necessary?

A. No, sir, they did not hurry me. They told me I could stay as long as I wanted to, and that when I was finished with my private conference to ring the bell; that we were locked in there. And when I got through talking with Elmer Davis, I bade him good-bye and left.

Mr. Downs: May it please the Court, at this time I would like to cite to the Court Section 8-531.1 which reads as follows:

> "Communication Between Clergyman and Communicant: No clergyman, ordained minister, priest, or rabbi of any established church or religious organization shall be required to testify in any action, suit, or proceeding concerning any information which they have in confidence communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust when the giving of such testimony is objected to by the communicant, providing that the presiding judge in any trial may compel such disclosure, if any, that in [fol. 96] his opinion the same is necessary to the proper administration of justice."

I do not have that particular statute, but I am sure that that is the full text of the statute.

The Respondent at this time requests the Court to rule as to whether or not we can ask the doctor regarding any matters pertaining to the admission or confession, parts that he has discussed with the Petitioner in this matter.

The Court: Do counsel for the Petitioner desire to be heard with respect to that motion?

Mr. Bell: Your Honor, we Object to the motion. We contend that it should not be allowed.

The Court: Upon what ground?

Mr. Bell: Well, communication, whatever it was—I don't know the contents—communication between a minister is a confidential matter that should not be divulged. We say it is incompetent too, Your Honor. You see, Your Honor, we are not concerned in this hearing about the guilt or innocence of Elmer Davis. The object of this hearing is for the Court to determine whether this confession was voluntarily or involuntarily obtained. So far as the guilt or innocence of this man, it is not before this Court. We say that it is not competent and should not be allowed.

[fol. 97] The Court: Well, I think that the voluntary or involuntary nature of this confession is indeed the primary issue before the Court, and any evidence relating to the circumstances under which the statements, admissions, or

confession were made is relevant, I think, upon the question of whether or not they were voluntary. Because of the serious nature of the constitutional question involved here and the serious import of this case as a whole, I think the ends of justice require that any witness who possesses any information relevant and material to the inquiry should, in the interest of justice, disclose it.

The Motion is Allowed, and the Court directs the witness, Dr. J. S. Nathaniel Tross, to disclose such communications as he had with the Petitioner, Elmer Davis, Jr., with respect to any statements, admissions, or confessions which he may have made with relation to the offense with which he was then charged.

You may proceed. Do you desire to ask questions?

Mr. Downs: Yes, sir.

By Mr. Downs:

Q. Dr. Tross, did you discuss with the Petitioner, Elmer [fol. 98] Davis, on the 7th of October, 1959, as to whether or not the statements he made to the police, either written or oral demonstrations he made to the police, were voluntary or not?

A. Yes, I spoke of the voluntary or involuntary nature of anything he might have said to the officers.

Q. Did he tell you then, Dr. Tross, whether or not his statements to the police, written or oral, or his demonstrations to the police were made voluntarily?

A. Yes, he said they were made voluntarily on the instigation—He was urged to make statements as he did make to Mr. Sykes because of the prayer of Mr. Sykes that moved him to say certain things to him.

Q. Did he tell you that he is the one that suggested to Lieutenant Sykes that Lieutenant Sykes pray for him?

Mr. Nivens: Your Honor, I Object to his leading the witness. I'd like for him to ask him a question.

The Court: Well, try not to lead the witness.

Q. Did Elmer Davis tell you who first mentioned prayer between he and Lieutenant Sykes?

A. Lieutenant Sykes asked him—I think, if I remember correctly—Lieutenant Sykes asked him if he wanted him to

pray, and he said that he told him yes, and Lieutenant Sykes prayed with him.

[fol. 99] Q. Did Elmer Davis tell you, Dr. Tross, on or about October the 7th during the morning hours when you were discussing this matter with him as to whether or not he was intimidated in any way making a written statement, confession, or demonstration of this crime?

A. No intimidation was mentioned.

Q. Did Elmer Davis tell you, Dr. Tross, as to whether or not on October 7, 1959, during the morning hours whether or not he was coerced into making any written, oral statements, or demonstrations of this crime?

A. No mention of coercion.

Q. Dr. Tross, on the morning of October the 7th, 1959, during the morning hours, did Elmer Davis, Jr., complain to you about not being properly fed during the time he had been incarcerated?

Mr. Nivens: I object to that question.

The Court: What is the basis of that objection?

Mr. Nivens: I am objecting to it because it is irrelevant to this extent: the fact that he did not mention to him that he was improperly fed, does not mean that he was not improperly fed. He didn't have to mention it to Dr. Tross. Dr. Tross hadn't asked him anything about being improperly fed. There may be innumerable things that he did not mention to Dr. Tross, so I don't see how that would [fol. 100] be pertinent to the question that is before us now.

The Court: If he had mentioned such things to the witness, would that be pertinent?

Mr. Nivens: Yes, sir, if he had mentioned them.

The Court: Do you consider the fact that he did not mention them in a private conversation with this witness that that fact is not relevant?

Mr. Nivens: Yes, sir.

The Court: Objection Overruled.

Q. (Read by Reporter) Dr. Tross, on the morning of October the 7th, 1959, during the morning hours, did Elmer Davis, Jr., complain to you about not being properly fed during the time he had been incarcerated?

A. No, sir.

By Mr. Downs:

Q. I believe, Doctor, you specifically asked him about that matter, didn't you?

Mr. Nivens: Objection. Now, Your Honor, he is leading him again.

The Court: Well, Objection Overruled. I don't know of any way he could direct his attention to that question without in a measure leading. He is asking him in effect if he discussed this particular aspect with him.

[fol. 101] A. Yes, I discussed his treatment. I want to be frank and honest about that. I did speak to him about his treatment at that time and at that place. He said that he had nothing but praise for Lieutenant Sykes, especially in the way in which he dealt with him. Nothing to be gained by hiding that.

Mr. Downs: Your Honor, may I leave my table?

The Court: Yes, sir.

Q. I'll ask you, Dr, Tross, if Mr. Walker, did not ask you the following question on Page 468 of the record: "State whether or not the defendant made any complaints to you about having not been fed properly"?

A. Yes, sir.

Q. I'll ask you if you did not answer the Solicitor: "I asked him that question specifically, and he said he was well taken care of." Wasn't that your answer?

A. Yes, sir.

Q. And is not that your answer now?

A. Yes, sir.

Mr. Downs: You may examine the witness.

Cross-examination.

By Mr. Nivens:

Q. Dr. Tross, you are held in high esteem by the people of the City of Charlotte, are you not?

[fol. 102] A. I think so.

Q. And especially by the officers and members of the Police Department?

A. I wouldn't say more so than anybody else.

Q. Well, now, Dr. Tross, is it usual for you to go to the

jailhouse when people are incarcerated to see how they are treated?

A. I have been doing that for thirty-two years.

Q. Well, now, you have been doing it for thirty-two years. Approximately how many occasions in these thirty-two years?

A. Not less than once a week.

Q. You go to the jailhouse once a week?

A. Yes, sir.

Q. To see somebody?

A. Yes, sir, or to see who is in there that I may know.

Q. Well, now, you say that Elmer Davis said to you that he had not been coerced in any way. Do you know anything about the limits of Elmer Davis's education?

A. Yes, sir, I do.

Q. From your knowledge, approximately how much education has he had?

A. Oh, not more than about the third grade, third or fourth grade.

Q. In fact, Elmer Davis would not know what the word [fol. 103] "coercion" meant, would he?

Mr. Downs: I object to that.

The Court: Objection Overruled, if he knows.

Q. You wouldn't expect a man of a third-grade education to know all the technical implications of coercion, would you?

A. Now, I didn't use the word "coercion" when I talked to him.

Q. You did not use the word "coercion"?

A. No. I wouldn't.

Q. You are reaching a conclusion from your experience with him at this particular time that he was not coerced; is that right?

A. Yes.

Q. Yes, now, Mr. Downs asked you on direct-examination at what time were you called on this particular morning?

A. I wasn't called.

Q. You were not called?

A. No.

Q. But you responded—You didn't say you were called, but you did make the statement that you came up there between 10:00 and 11:00 o'clock?

A. Yes, I did.

Q. Now, when you went up there on this particular date, were you looking for Elmer?

[fol. 104] A. Yes, sir, I went to look for him.

Q. Now, how did you know he was there, Dr. Tross?

A. I read in the papers that he was arrested, his name was Davis, and he was from Belmont. I had pastored in Belmont for years, and most of the Davis family were members of my church, and I remembered Elmer, so I went to see about him.

Q. Well, Dr. Tross, it was never in the paper that Elmer Davis was incarcerated until after the confession, was it?

A. No, as soon as he was arrested I heard—I read that he was, and I went up there the next morning.

Q. What paper did you read this in?

A. The Charlotte papers.

Q. Do you remember which paper?

A. Oh, I don't know whether it was in the Observer or the News, but it was published.

Q. Well, now, you know he was arrested on September the 21st, 1959?

A. I don't know what day. But at that particular time my interest was aroused, after reading the name and relating it to the Davis family, having pastored there for four years. They were very good members, very intimate members of the church.

Q. Well, Dr. Tross, here's what I want to ask you: If it came out in the paper that he was arrested on September [fol. 105] 21, 1959, will you explain to this Court why you waited until October 6th or October 7th, after he had made his confession, before you went there?

A. From the 29th to the 6th, Mr. Nivens, is a very short time if you are busy.

Q. Not the 29th. He was arrested on the 21st of September, 1959.

A. Twenty-first. It might have been possible that I was not available at that time.

Q. You said you went up there every week, Dr. Tross?

A. Yes, I did say so.

Q. And you saw some one person every week?

A. Going up every week, Mr. Nivens, doesn't mean necessarily in the space of thirty-two years that one week

might not have elapsed. I might not have been in town, perhaps, that particular week.

Q. Well, you know where you were on this particular occasion, don't you, at this particular time; can't you recall where you were?

A. No, not at this moment. But I went to see him as soon as it was possible for me to do so.

Q. Well, now, did you know that Elmer Davis was in jail three weeks at the time when you went there?

A. I don't know whether I knew he was there three weeks or not, but I know he was arrested. I did not get the [fol. 106] connection between Elmer Davis, or it didn't dawn upon me that Elmer Davis was related in any way to the people there that I knew who were members of my church in Belmont; and after talking to my wife about it —They were very intimate members and good people, the Davises; and when I heard it, I went over there to see if I knew the boy. That is what took me over there, currently, to the station.

Q. Well, Dr. Tross, don't you remember that the newspapers, when they were published about this incident, said that Elmer Davis was from Charlotte?

A. No, I don't know whether they said from Charlotte; but whenever they said that he was from Belmont, then my interest was increased.

Q. Then your interest became increased?

A. Yes.

Q. Now, I want to know this: As a clergyman, you were not interested in the legal aspects of this case, were you?

A. Only so far as it impinges on justice.

Q. Well, now, these other visits that you made to see other prisoners, did you investigate about their constitutional rights?

A. Oh, yes, sir.

Q. That's just routine with you when you visit prisoners?

A. Routine and other matters, also.

Q. Let me ask you this: Out of your thirty years' ex- [fol. 107] perience in visiting the jails, have you ever found any one person whose constitutional rights had been impinged in your opinion?

Mr. Downs: Objection.

The Court: Overruled.

A. Yes, sir.

Q. And did you ever find anybody in Charlotte whose constitutional rights had been impinged?

A. Yes, sir.

Q. Well, do you remember them?

A. Oh, yes, I think I can. Perhaps not all of them, but a few.

Q. Well, now, what did you do about it?

A. I went sometimes to the Police Department and spoke to them; sometimes I went and saw the Judge about it; sometimes I went to the welfare about it, and so on.

Q. Well, now, Lieutenant Sykes came to you before Elmer Davis and stated that he wanted to know if he had had plenty to eat; didn't he?

A. Lieutenant Sykes?

Q. Lieutenant Sykes. You stated that on direct-examination, didn't you?

A. What?

Q. Didn't he come in your presence while Elmer Davis was there and ask if Elmer Davis had had plenty of food to eat?

[fol. 108] A. No, sir, I didn't say that.

Q. Dr. Tross, you don't deny that you said that Lieutenant Sykes came in your presence and asked Elmer Davis if he had had plenty to eat?

A. No, sir, not that. I didn't say that.

Q. Well, did Lieutenant Sykes come to Elmer Davis in your presence?

A. He did.

Q. All right. What was the conversation?

A. And Lieutenant Sykes asked me if I knew him. I said, "Yes," and I related my knowledge of the boy. And he said, "Do you think I did right by offering prayers for him?" I said, "Did he accept it?" He said, "Yes, willingly." And I thanked him for doing it; I said it was a very fine gesture, and Elmer appreciated it; he told me he appreciated his prayers.

Q. Well, do you think it was a very fine gesture, whether psychological or brutal, or physical rather, to make a man confess to a crime?

Mr. Downs: Objection.
The Court: Overruled.

A. When it comes to a matter of prayer, I think prayer is not only psychological; I think it is dynamically appropriate.

Q. Well, now, did Lieutenant Sykes tell you anything [fol. 109] about the prayer?

A. In what respect? We spoke about prayer and the efficacy of prayer and the power of prayer. Lieutenant Sykes is a very religious man, and he approaches all his business by that means. So it wasn't new to me, my experience with Lieutenant Sykes.

Q. Dr. Tross, what were the contents of the prayer that he had with Elmer Davis, if you know?

A. I think the main object of Lieutenant Sykes's prayer was that the boy should be given enlightenment, direction, be given courage, and be steadied.

Q. How about remorseful?

A. Remorse?

Q. Yes.

A. I don't know. I don't know; I never heard. Though I spoke of prayer with Lieutenant Sykes very often, I don't know what were the reactions to all his prayers.

Q. How about being repentant?

A. I don't know. He must have got repentance and remorse from the many cases he dealt with and the many persons for whom he offered prayer. But I don't know in this case whether he got remorse. We didn't discuss that aspect of it.

Q. Did Lieutenant Sykes tell you how he got Elmer Davis to permit him to pray with him?

[fol. 110] A. No, he didn't say. He just said he prayed with him.

Q. Did Lieutenant Sykes tell you how many times he prayed with Elmer Davis before he confessed?

A. No, sir. He said he prayed with him.

Q. I believe you did testify on direct-examination that Lieutenant Sykes made the statement to you or made the statement in your presence that his prayer was the turning point in these matters that Elmer Davis was being held for?

Mr. Downs: Objection.

The Court: Overruled.

A. No, sir.

Q. What did he say?

A. I told you already that he stated that he was very happy over the opportunity to pray with Elmer; that Elmer in turn was happy over it. And Elmer told me that he appreciated the prayer of Lieutenant Sykes.

Q. But didn't you state on direct-examination that Lieutenant Sykes said that this was the turning point?

A. No. I don't know anything of that.

Q. You don't remember saying that?

A. No. I couldn't say that.

Q. Now, Dr. Tross, did you have any conversation with Elmer Davis about this purported confession?

A. No, sir.

Q. You did not?

[fol. 111] A. No.

Q. Did you mention anything to him about a verbal confession?

A. No, sir.

Q. So he only stated to you that he was concerned about the prayer that was presented to him by Lieutenant Sykes, is that right?

A. State that again, please.

Q. He only discussed with you in the main the prayer that was given him or was given in his presence by Lieutenant Sykes?

A. No. We were there with him for one hour.

Q. For one hour?

A. For one hour. There were other things that were discussed besides the prayer. I couldn't have been discussing only the prayer with Lieutenant Sykes when I was there with Davis for an hour. And his years, the early years of his life, concerned us, and his objectives, his objectives for the future——

Q. What do you know about Elmer Davis?

The Court: Just one moment. Let him finish his answer.

A. (Continuing) His objectives for the future and how he felt personally and what were his hopes for the future, matters of that kind that were in my province.

[fol. 112] Q. Well, let me ask you this: From your experience with Elmer, did he have full, reasonable appreciation for the prayer that had been administered by Lieutenant Sykes?

A. Yes, sir, extremely so.

Q. Now, tell me this: I believe when this case was tried in Superior Court that you made the statement that this boy was not very bright?

A. Yes, I said in this early years he was not what you would call a bright boy in school.

Q. Well, you know of nothing that increases a man's ability, do you? You haven't heard of anybody being stupid at one stage in his life and brilliant at another stage, have you, Dr. Tross?

A. Depends upon who is finding that out.

Q. You said he had never appeared to you to be particularly normal during his youth?

A. Not "normal." He was not a particularly bright boy in school.

Q. Now, what was the name of this church that you pastored in Belmont?

A. O'Conners Grove, A.M.E. Zion Church.

Q. Was this boy frequently in attendance?

A. No, not frequently.

Q. Do you know anything of his parental background, the relationship between him and his parents?

[fol. 113] A. Not much. When I heard the name, Davis, and heard he was from Belmont, I went, and upon investigation I found that he was distantly related to some of those who are intimate and faithful members of my church.

Q. Now, Dr. Tross, do you know why they gave you such special treatment in this particular situation when they had denied others the right to see him?

Mr. Downs: Objection.

The Court: Sustained as to the form of the question.

Q. Well, do you know why they gave you such special treatment?

Mr. Downs: Objection.

A. It was not special; it was routine.

The Court: Well.

Q. It was routine?

A. Yes. The officers of the law and the judges and the Welfare Department are always affable and ready to cooperate with me as I am to cooperate with them.

Q. All right, let me ask you this, Dr. Tross: Have you ever been called upon during your thirty years' experience to testify in a case just as you are testifying in this case?

A. Yes, sir.

Q. What case was that?

[fol. 114] A. It was the case in the matter of the two boys who were guilty of this ice pick—icehouse murder, you remember, in Charlotte. There were two boys, you remember. I can't think of their names now.

Q. And you went up to see how they were treated?

A. I went into the court and spent a night sleeping with them in the cell. I slept there that night with them, because I knew both boys well. They had come to see me, I had helped them, I had given them clothes, I had given them money; at Christmastime I had gone out and helped those boys; and they sent for me; they wanted to talk with me.

Q. Well, Dr. Tross, that is rather unusual, isn't it?

A. No, sir, it isn't for a minister. For a minister it should not be.

Q. I didn't ask you whether it should or should not be, but isn't it unusual for the police department in any city to permit someone to come in the jail and spend the night with them?

A. No, that wasn't unusual. Because I take it if we visit ourselves and the duties we ought to perform, the officers of the law will cooperate to any extent that is within the law. (To the Court) May I state another case, Your Honor?

The Court: Yes.

A. (Continuing) Another case that perhaps would give [fol. 115] enlightenment is the Medlin case. Medlin was a boy that I helped. He was executed here in Raleigh. Medlin was a boy that I helped.

Q. You mean you had helped him, and he was executed?

A. No, I——

Q. You mean you helped him before then?

A. I helped him as a boy when he was coming along.

Q. Did you testify in the Medlin case?

A. No. I didn't have any reasons to. Medlin sent for me, and he was one of the men that I stayed with for long hours that night. And the Police Department knew nothing of the Medlin case. Mr. Whitener, who is now a Congressman, came to my house and talked to me about the case. I think the case was plain and explained anyway, but the boy held out along certain lines. And after sending for me, and I prayed with him and talked with him—May I state this?

Q. Yes, sir.

A. He jumped up from his cell and took the prison bars with both hands and shook them and said to me, he said, "For God's sake, why didn't I see you Sunday night when I passed by the church, Ebenezer Church, and they were all sitting there; nobody invited me in the church, and so I passed along and met with some friends, and here I am today."

I said to Medlin then, I said, "Medlin, you are free [fol. 116] now." He said, "I am free and I am satisfied." I said, "Do you, as your spiritual adviser, want me—what do you want me to do about it?" He said, "I don't know. You come back tomorrow."

I came back the next day, and he said to me, "Do whatever you think is right; I'm all right now; I don't care; I'm happy."

Now, that was the case. And so these things are not new to me. I think you know them, too, Mr. Nivens.

Q. Well, it's not a matter of what I know, Dr. Tross; we are trying to get some things in the record.

A. Well, I'm giving you this.

Q. Now, Medlin was executed?

A. Yes, he was.

Q. Now, as to the Medlin case did you furnish Mr. Whitener any information that led to his conviction and execution?

Mr. Downs: Your Honor, we object.

Mr. Nivens: Well, Your Honor, he went into it.

The Court: Well, what is your purpose for this line of questioning?

Mr. Nivens: I'm trying to show that he helped to get somebody to confess to another crime.

The Court: Is it for the purpose of impeachment?

[fol. 117] Mr. Nivens: Yes, sir.

The Court: Objection overruled.

By Mr. Nivens:

Q. Did you furnish Mr. Whitener with any information that led to the conviction of Medlin?

A. No, sir. Mr. Whitener never made any attempt to extract any confession or anything that was stated between us.

Q. But you talked to Mr. Whitener before he was tried, did you not?

A. Oh, yes. Mr. Whitener always came to see me.

Q. About the Medlin case?

A. Yes, he came to see me about that.

Q. Well, let me get back to this situation. Do you recall from the records and from what you have heard what date it was that Elmer Davis confessed?

A. No, I did not talk to Medlin about his confession.

Q. I'm not talking about Medlin.

A. I mean I didn't talk with Elmer Davis about any confession.

Q. But you knew that he had confessed?

A. Yes, I knew that.

Q. Tell me this, Dr. Tross: Do you recall whether or not this boy was flashed on television at the time he was apprehended?

[fol. 118] A. Yes, I remember that.

Q. He was flashed on television?

A. I think I remember seeing him there. I don't know if it was the same day or how soon, but I did see him on the screen.

Q. It was very shortly after he was apprehended, wasn't it?

A. It must have been.

Q. And it was before October the 6th, wasn't it?

A. I don't know specifically. I did see him on the screen, I know that; it was shortly after he was apprehended, I think.

Q. I just want to say this for the record: Dr. Tross, I don't want you to feel funny about any cross-examination. We are just trying to get the facts for the record.

A. No, no, I'm not offended. I am just trying to be as

truthful as I can. I love Elmer Davis as though he had never done the crime. I don't know. I have the utmost respect for him as a member of the human race. I am not trying to conceal anything, and I don't want the Court to feel that I am a stooge for the Police Department. For thirty-two years this has been my work in the City of Charlotte, and this is my twenty-fourth year working on interracial problems, and twenty-four years on the radio on the same topic.

[fol. 119] Q. Well, Dr. Tross, you certainly know that everybody doesn't agree with your approach to the solution of the racial problem?

A. Nobody. They didn't believe with Jesus in his approach to the solution of problems.

Q. Well, now, you are not being biased by bringing up the race problem, are you? You are not being prejudiced in this matter at all, are you?

A. No, indeed.

Q. You certainly feel that Elmer Davis has a right to constitutional protection as well as anybody else?

A. Absolutely. Yes, sir.

Q. But you just basically believe in the separation of the races, don't you, Dr. Tross?

Mr. Downs: Object to that.

The Court: Well, now, I believe that is going a little far. Objection sustained.

Mr. Nivens: That is all.

Redirect examination.

By Mr. Downs:

Q. Dr. Tross, I believe you stated that you had talked to prisoners whose constitutional rights had been violated; is that what you said?

A. Yes, sir.

[fol. 120] Q. And when you reported this to the various officials and authorities and judges in Mecklenburg County, did they refuse to do anything about it?

A. Yes, sir. I might say, Mr. Solicitor——

Mr. Nivens: Now, Your Honor, I object to that. He has already answered the question.

The Court: Objection overruled.

A. (Continuing) I say, Mr. Solicitor, that it was upon my investigation, my findings that were submitted in writing to the City Council and to other agencies there, that led to the effort and finding of a place for the retention of juvenile prisoners who are incarcerated up there, very often, with older criminals. It was on my effort that changes were made.

Mr. Nivens: Your Honor, I object to all of this.

The Witness: Well, you asked me.

Mr. Nivens: I didn't ask you; Mr. Downs asked you.

The Court: Objection overruled.

Mr. Nivens: Well, Your Honor, may I ask this question of the Court? Can he be permitted to strengthen his character through his own testimony?

The Court: You are attacking his character then I take it?

[fol. 121] Mr. Nivens: No, sir, I am not attacking his character, but I don't feel that he should be able to get into the record all the good things about his character coming from him. Everybody—Elmer Davis would get on the stand and say that he was a perfectly good man.

The Witness: I appeal for the protection of the Court on the ground that you doubted my veracity and also you impugned my relationship to my race and my relationship to the other race, and you doubted whether or not my motives were laudable.

The Court: Well, any witness who goes upon the stand is subject to cross-examination with respect to his credibility and may be impeached or asked impeaching questions if counsel so desire. In the ultimate analysis the credibility is a matter for the determination of the trier of the facts. Is there anything further?

Mr. Downs: Well, sir, I'd like for him to go ahead and continue his answer about what he has ever approached the authorities about someone's constitutional rights being violated and did they refuse to do anything about it. I think he was attempting to answer that question.

[fol. 122] Mr. Nivens: He had already answered it. He said no.

The Witness: Yes, sir, much was done about it, my findings.

By Mr. Downs:

Q. In other words, Dr. Tross, when you reported to the authorities about this matter——

Mr. Nivens: Your Honor, I object to that.

The Court: Let his question be asked.

Q. Whenever you reported to the officials and judges in Mecklenburg County that someone's constitutional rights had been violated, they did do something about it, didn't they?

A. Yes, sir.

The Court: Well, I think we have gone far enough along that line. We have all wandered a little afield.

(Witness excused.)

JOHN W. YANDLE, recalled by the Petitoner, having previously been duly sworn, testified further as follows:

Direct examination.

By Mr. Bell:

Q. You are Captain Yandle of the Charlotte Police De-[fol. 123] partment?

A. Yes, sir.

Q. And you are custodian of the records there?

A. Yes, sir.

Q. I hand you a piece of paper here, Petitioner's Exhibit No. 1, and ask you if that is the sheet of paper that you testified about this morning in this hearing?

A. It is.

Q. I want you to tell the Court what this "PHW Bound to Superior Court," what does that mean?

A. Preliminary hearing waived; bound over to Superior Court; no bond.

Q. What do you mean by "preliminary hearing waived"?

A. Our Judge of City Recorders Court sits as a committing magistrate on felony cases. He gives a preliminary hearing on felony cases, and in this case that preliminary hearing was waived; no evidence was put on in City Court.

Q. Do you know whether or not Elmer Davis had a lawyer at this hearing.

A. No. Mr. Bell, I said this morning I had never seen Davis until this morning.

Q. I say do you know whether he was represented by counsel at the hearing?

A. No, I do not. Our records wouldn't show that.

Mr. Bell: All right, come down.

[fol. 124] Mr. Downs: No questions.

Eloise Stowe, called as a witness by the Petitioner, having been duly sworn, testified as follows:

Direct examination.

By Mr. Nivens:

Q. Will you give the Court your name and address?

A. My name is Eloise Stowe, 2507 Moreland Avenue, Charlotte, North Carolina.

Q. Now, Mrs .Stowe, what relation are you to Elmer Davis, Jr.?

A. I am his sister.

Q. Are you his half sister or whole sister?

A. Whole sister.

Q. Now, do you recall his being arrested on September the 21st, 1959, concerning the murder of Mrs. Foy Bell Cooper?

A. Yes, sir, somewhere around there.

Q. When did you find out about his arrest?

A. Well, the first about it, what I found out, was I was out in the yard one afternoon, and it was three detectives they came. But they didn't speak of Elmer. They asked about did I have a half brother and when had I saw him.

Q. Three detectives. Do you see any of those detectives [fol. 125] present here today?

A. I really don't know, it's been so long.

Q. You don't recognize any of them?

A. Not any of those three, I don't think.

Q. Well, now, they came to your place, and what did they say?

A. Well, they asked me when had I saw my half brother.

Q. Let me ask you this: Do you have a half brother?

A. Yes.

Q. What is his name?

A. Fred Stevenson.

Q. All right. So they asked you about your half brother, and what did you say?

A. Well, I hadn't saw him in years, maybe ten or maybe twelve. It had been a long time since I had saw him in years. So that was that.

Q. Well, what did you say?

A. I told them I hadn't saw him in maybe ten or twelve years.

Q. Now, what else did they talk to you about?

A. Well, they asked me about had I missed anything out of the house like clothing or shoes or pants, and I told them, "No, sir," and they asked me had I looked, and I said I didn't have no reason to look because I didn't know anything about it, so I had no reason to look for anything. [fol. 126] So one of them said—I don't know which one it was, but he said, "I don't think she know nothing," and so they just left.

Q. Now, did they mention anything to you about the arrest of Elmer Davis?

A. No, sir, not at the time.

Q. When did you find out about Elmer's being arrested?

A. Well, I found out—I guess it was maybe three or four days later that I really found out it was him.

Q. Then what did you do?

A. I went to the jail, I went to the city jail. It was in the morning, and I asked to see him, and they said he couldn't have——

Q. Who did you ask to see him?

A. I guess it was the jailer. It was a man. He had on pants and a shirt, that's what he had on.

Q. What kind of pants and shirt did he have on?

A. I believe it was gray, I'm not sure. I'm not sure exactly what it was, because it's been so long.

Q. Did it look like a uniform?

A. Yes.

Q. What did he say?

A. Well, he said Elmer wasn't having any visitors at that time.

Q. Then what did you do?

[fol. 127] A. I went back home and stayed until afternoon, and that afternoon I came back down and I asked again, and they told me the same thing.

Q. Well, now, did he show you anything, or did you see any records that were being held by the jailer?

A. Well, one of the mens looked on a pad. I don't know whether it was a pad or a book, I don't know exactly what it was at the time.

Q. Now, Mrs. Stowe, did you ever get to see your brother?

A. After he had went to the county jail.

Q. Now, what did you do?

A. Well, you know, after I told you about I went down and I didn't get to see him, a detective came out one night.

Q. Who was this detective, if you know?

A. It was a Festerman or Fesperman, or something like that. He called his name.

Q. Detective Fesperman?

A. Yes.

Q. Well, is he in here now?

Mr. Bell: Mr. Fesperman, will you stand up, please?

Mr. Downs: Mr. Bell, she is trying to identify the witness now. You are pointing him out to her.

By Mr. Nivens:

Q. Well, is this the detective that came to your house?

[fol. 128] A. Yes.

Q. What did he say?

A. Well, he told me they had got Elmer and he had confessed to this murder, and he said they had went out and bought him a steak and raw peanuts.

Q. Did he say how many peanuts they bought him?

A. He said a big bag of peanuts is what he said.

Q. And a steak?

A. Yes.

Q. Now, did you later go to the jail any more, or to the county jail?

A. No, sir, I never did go back. After I got to see him, I didn't go back any more.

Q. When did you get to see him?

A. I got to see him after, you know, Mr. Fesperman told me. I went down—it was on a Wednesday, I think, a visiting day—I went down, and they let me see him that evening—that morning rather.

Q. Where was he then?

A. Well, he was in the county jail.

Q. Well, did you have a conversation with him?

A. Yes, sir, I talked to him.

Q. What did he tell you?

A. Well, when I approached him, I spoke to him, you know, and then I asked him did he do this crime, and he [fol. 129] said no. He said they had, you know, constantly questioned him night and day, and he said they were starving him and didn't give him any food.

Q. Did you carry him any food?

A. Yes.

Q. Do you recall what you carried him?

A. I think it was pork chops and a bologna sandwich and peanut butter crackers and cigarettes.

Q. Did he state to you any other manner in which he was mistreated?

A. Well, he said they had beat him and like that.

Q. Did he make any statement to you with regards to this confession, written or oral?

A. Sir?

Q. Did he make any statement to you with regards to a confession that he had made either written or oral?

A. No, sir.

Q. Well, did he tell you that he had confessed?

A. Yes, sir; said they had beat him, and he confessed.

Mr. Nivens: That is all.

Cross-examination.

By Mr. Downs:

Q. You say the second time you went back to the city jail there were two jailers there?

[fol. 130] A. No, sir, I didn't say there were two jailers.

Q. Well, on either occasion was there more than one person at any time that you went there?

A. I really don't know. I don't know whether it was or not.

Q. Well, describe the person you talked to the first time you say you went to the city jail.

A. All I know it was a man.

Q. Well, was he gray-headed, black-headed, blond, or what?

A. Well, I really was so upset I really don't know. I didn't pay that much attention after they said I couldn't see him.

Q. Well, was he fat?

A. I think he was maybe about your height, not quite. I don't think he was quite your height. But really as to the color of his hair, I just really don't know.

Q. And on the second occasion did you talk to the same man that you talked to on the first occasion?

A. No, sir, I'm sure it wasn't the same man.

Q. Well, you talked to two different men?

A. Yes, sir, I think it was two different mens.

Q. Did you ever talk to Jailer Ross back here?

A. If I did, I don't remember it.

Q. Well, you heard him say there wasn't but two people [fol. 131] that worked there in the jail on his shift during the time Elmer Davis was confined in jail, didn't you?

A. Said I said what?

Q. You heard him testify there were only two people that were there at the jail at the time—jailers on the day shift at the time Elmer was confined, is that right; didn't you hear him say that?

A. I don't know.

Q. Well, you were sitting right over yonder and heard the testimony, didn't you?

A. Yes, I was listening.

Q. Now, you were living in Charlotte at the time this matter was heard in December of 1959 in the Superior Court, weren't you?

A. Yes, sir.

Q. And your whereabouts, you say, were known to your brother, Elmer Davis?

A. Yes.

Q. Were you called as a witness in any way to testify in

Superior Court one way or another regarding the voluntariness or involuntariness of this confession?

A. No, sir, not at the time.

Q. When is the first time you have ever seen Mr. Bell, Mr. Nivens, or Mr. Brown?

A. Well, I have seen them a lot of times—Mr. Nivens—[fol. 132] I mean Mr. Bell, but I haven't saw Mr. Nivens. I just talked to him until the other day.

Q. Well, you knew your brother was being tried in '59, didn't you?

A. Yes.

Q. You knew Mr. Bell was leading counsel in the case?

A. Yes.

Q. You knew Mr. Nivens was associate counsel?

A. Yes.

Q. Did you go to them when he was being tried in December, 1959, and tell them what you have told here on the stand today?

A. No, sir, I did not.

Q. Why didn't you?

A. I had just got out of the hospital with kidney trouble.

Q. Well, you have a telephone, don't you?

A. Yes, sir.

Q. And wasn't anything to prevent you from Mr. Bell on the telephone and tell him what you have told here on the witness stand today prior to the time your brother was tried in '59, was there?

A. No, there really wasn't.

Q. And all you had to do was to pick up the receiver and dial his number because his number was listed in the [fol. 133] telephone book under the attorneys, isn't it?

A. Yes, sir, sure.

Q. Now, these detectives, you say the three of them came out to your house. Do you see any one of those three detectives here in this Courtroom today?

A. Looks like this man here was one, I believe. I'm not sure. You know, I have never been in Court or with the law.

Q. Are you pointing to the red-headed man?

A. I says it looks like it was his size. I don't know whether it was him or not.

Q. All right, point out any one of the other three that you say.

A. I really just wouldn't know.

Mr. Downs: Stand up, Mr. Hucks.

Q. Don't you know that Mr. Fred Hucks has been out to your house on two different occasions?

A. Not at my house.

Q. This man here?

A. No, si

Q. Don't you know that Mr. Fred Hucks came to your house and told you that Elmer Davis wanted to see you, and you told him that you could not go down there and would not go down there because you had to stay home and look after your children?

A. No, sir—they haven't—I haven't—They's not been [fol. 134] any men but those three mens and the night the man said he was Mr. Fesperman that came.

Q. I ask you if you didn't make that statement to Mr. Hucks, the detective that just stood up right here?

A. I don't ever remember seeing him before.

Q. And Mr. Fesperman came to your house shortly after Elmer Davis was arrested and before he confessed and told you that Elmer Davis was in jail?

A. No, he did not. He came one time.

Q. I'm saying that was before Elmer Davis confessed.

A. (No answer.)

Q. Now, isn't that right?

A. No, it was not.

Q. Well, how can you pinpoint the date; answer that.

A. How can I do what?

Q. How do you know whether or not it was before or after Elmer Davis confessed?

A. But the reason I know it, it was after he said that he had confessed and they had brought him the food. That's the reason I know. That was the onliest reason I know.

Q. Now, Mr. Homer Gardner, the red-headed man who stood up, he was one of the ones who came out to your house too, wasn't he?

Mr. Downs: Stand up, Mr. Gardner.

A. I told you I didn't know, but he looks like he was one [fol. 135] of them. I'm not sure. I have never been in

Court, and I don't know anything about this, and I'm trying to tell the truth about the situation, and that's that.

Q. Did he mention anything about your brother being incarcerated or in jail down at the city jail when he was out there?

A. No, sir. I say I didn't see him.

Q. How soon after you say you were notified that your brother was in jail did you go up to see him?

A. I imagine it was three or four days after I really found out that it was really him.

Q. Then you are positive you did not go prior to the time he confessed?

A. Say what?

Q. You are positive that you didn't go then to the jail prior to the time he confessed?

A. I went after he confessed.

Q. All right.

A. And before he confessed. But I went to the city jail first and they wouldn't allow me to see him. But the onliest time I got to see him it was after they said he had confessed.

Q. Now, how many times in recent weeks have you conferred with Mr. Bell, Mr. Nivens, or Mr. Brown?

Mr. Nivens: Objection.

[fol. 136] The Court: What is the basis of the objection?

Mr. Nivens: I say it isn't pertinent, Your Honor.

The Court: Objection Overruled.

Q. Answer the question.

A. Say what?

The Court: Read the question.

Q. (Read by Reporter) Now, how many times in recent weeks have you conferred with Mr. Bell, Mr. Nivens, or Mr. Brown?

A. Well, just last week.

By Mr. Downs:

Q. Then you say from December, 1959, to about a week ago in 1963 is the first time you ever told Bell, Nivens, or Brown what you were going to testify to?

A. No. I mean I have talked to them. I mean but we didn't discuss, you know, me coming up here a-speaking like

this. Now, I have been knowing Mr. Bell; and Mr. Nivens, he's called me and talked to me about this, I think; I believe it was the last time when they had the trial or whatever it was.

Q. But you say you did not confer with them prior to the time Elmer Davis, your brother, was tried; didn't you say that?

A. Yes.

[fol. 137] Q. I want you to tell the Court when was the first time after your brother was tried and convicted that you talked to Mr. Bell, Nivens, or Brown.

A. I don't exactly know.

Q. Well, was it one week, one month, two months, six months, or a year?

A. I imagine when I talked to Lawyer Nivens there, I guess it was maybe about a month or two, something like that.

Q. A month after December, 1959?

A. I guess it was something like that.

Q. They have never asked you to give an affidavit in this matter, have they?

A. No, sir.

Q. And they never called you as a witness when the Writ of Habeas Corpus was heard before this very Court here previous to this time?

Mr. Bell: Your Honor, we Object to that on the ground that this Court wouldn't even allow us a hearing.

The Court: Yes. There has been no prior hearing before this Court.

Q. Now, you are positive the jailer showed you Petitioner's Exhibit No. 1, the Arrest Record?

A. I said he looked on a pad. I don't know whether it [fol. 138] was that or not.

Q. Well, I want you to look at this and tell me whether or not.

Mr. Bell: Your Honor, I think she has already answered that. She said she didn't know whether it was that or not.

The Witness: I really don't.

The Court: Well, he can show the paper to her and see if she recognizes it.

Mr. Bell: She said he looked on a book or a pad.

The Court: Objection Overruled.

By Mr. Downs:

Q. Have you ever seen that piece of paper before?

A. I don't know. I told you I was upset at the time that I did go down there, so I really don't know whether it was that or not. It could have been, or it could not have been; I really don't know.

Q. How long prior to the time you went down to the jail was it that you had seen your brother, Elmer Davis, Jr.?

A. How long had it been since I had see'd him?

Q. Prior to the time you went down to the jail before.

A. I imagine about a week or maybe about seven or eight days, something like that, I imagine, from the time I [fol. 139] had—what do you mean; the first time I went to the jail?

Q. No, ma'am. You say you went to the jail to see Elmer Davis?

A. Yes.

Q. I'm talking about the first time. When was the time prior to going to the jail that you had seen your brother, how long had it been?

A. I haven't saw him since until today.

Q. No, ma'am. I'm asking you—you say you went to the jail when you found out Elmer was in jail. I want you to tell the Court and for the record how long prior to that time was it you had actually seen Elmer.

Mr. Bell: Your Honor, we Object to it, and we wish counsel would—I don't think she knows what "prior" means.

The Witness: I don't.

Mr. Bell: If he would ask the question in her language, maybe she could answer it.

The Court: Do you understand what the word "prior" means?

The Witness: No, sir, I don't. That's the reason I told you this is the first time—I have never been even in the Court House before this time.

The Court: Very well. Rephrase your question.

By Mr. Downs:

[fol. 140] Q. Before you went to jail the first time, when was it before that time that you had actually, physically seen your brother?

A. Oh, it had been years, maybe ten or fifteen, maybe ten or something like that. It had been a long time.

The Court: Ten or fifteen what?

A. (Continuing) You see, he was already in trouble at the time.

The Court: I didn't understand. You said ten or fifteen something. I didn't hear that.

The Witness: Years. I don't know exactly how many.

By Mr. Downs:

Q. Would you state whether or not you would recognize the jailer with whom you talked on two different occasions, who you say refused you permission to see your brother, if he was brought in this Courtroom?

A. I tell you I wouldn't recognize him, I'm sure I wouldn't.

Q. What time was it you went down there in the morning the first time to see your brother, Elmer Davis?

A. I imagine it was about 9:00 or a little after 9:00.

Q. What was the time in afternoon you went down to see your brother in the city jail?

A. It was between 4:00 and 4:30.

[fol. 141] Mr. Downs: Come down.

Mr. Nivens: Just one minute.

Redirect examination.

By Mr. Nivens:

Q. Mr. Stowe, why were you not present at the time your brother was tried the first time in Superior Court?

A. I had just got out of the hospital with my kidney. I had a kidney infection.

Q. You say you had just gotten out of the hospital?

A. Yes.

Q. Were you at home in the bed?

A. Yes.
Q. Were you under the care of a doctor?
A. Yes, sir. Dr. E. L. Rann.

Mr. Bell: Your Honor, the next witness particularly we would like to have time to confer with him, maybe five or ten minutes.

The Court: All right, the Court will be at ease for ten minutes.

(Ten-minute recess.)

Mr. Bell: Your Honor, we would like to have the confession that was introduced in evidence in the Superior court.

[fol. 142] Elmer Davis, Jr., the Petitioner, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct-examination,

By Mr. Bell:

Q. You are Elmer Davis, Jr.?
A. Yes, sir.
Q. How old are you, Elmer?
A. Thirty-two.
Q. I believe you are now confined at the State Penitentiary here in Raleigh, North Carolina?
A. Yes, sir.
Q. And you are at the present time on death row?
A. Yes, sir.
Q. How long have you been on death row?
A. Going on thirty-nine months.
Q. You are the Petitioner in this action, having filed a Petition of Writ of Habeas Corpus saying that your constitutional rights have been violated and that you are now being illegally detained by the penal authorities of the State of North Carolina. Are you now detained by them by the State? Are you over there in prison now?
A. Yes, sir.
Q. Now, you were charged before coming over here to

prison and convicted of the murder of the late Foy Bell [fol. 143] Cooper; is that right?

A. Yes, sir.

Q. You were convicted in Charlotte?

A. Yes, sir.

Q. Did you kill this woman?

A. No, sir, I didn't.

Dr. Downs: Objection.

The Court: Well, gentlemen, the issue of this man's guilt or innocence is not before the Court, but the question of the voluntary nature of his confession is. Why wouldn't that question be competent as bearing upon the voluntary or involuntary character of the confession?

Mr. Downs: Your Honor, in reading the opinion of the Circuit Court, they say on Page Number 10: "The question to be determined is whether Davis's will was overborne to obtain the confession," and citing Reck versus Pate, 367 U.S. 433-440, 1961, "and its probable truth can shed no light on this issue. See Rogers versus Richardson, 365 U.S. 534, 1961." That is quoting from Page Number 10.

The Court: Well, now while its probable truth can shed no light on the issue, the question now is whether the converse would shed any light on it. Objection Overruled.

[fol. 144] By Mr. Bell:

Q. Go ahead and answer the question. Did you kill this woman?

A. No, sir, I did not.

Q. Now, sometime before the 20th day of September, 1959, were you in prison here in North Carolina?

A. (No answer.)

Q. Before you were investigated for this crime, were you in prison in the State of North Carolina serving a sentence?

A. Yes, sir.

Q. Where were you in prison?

A. At Haywood County.

Q. Where is that?

A. It's up in the mountains.

Q. How long had you been up there?

A I think I went there in '57, at that camp.

Q. Did you escape and leave the camp?

A. Yes, sir.

Q. When did you leave?
A. I left September, 1959.
Q. During the month of September, 1959?
A. Yes, sir.
Q. Now, after leaving the prison camp, where did you go?
A. I went to Hickory first, and then I caught the bus and come to Charlotte.
[fol. 145] Q. How long did you stay in Charlotte?
A. Up until Friday.
Q. You stayed in Charlotte up until Friday, and then where did you go?
A. Went to Belmont.
Q. Why did you go to Belmont?
A. Because some of my relatives was over there.
Q. What relatives do you have living in Belmont, North Carolina?
A. All of my aunties stays over there, and cousins.
Q. Now, while you were in Belmont, were you arrested?
A. Yes, sir.
Q. Where were you arrested?
A. I come from my aunty's house the night they picked me up.
Q. When you were picked up, what did they do with you?
A. Put me in the jail over there.
Q. Who picked you up, if you know?
A. (No answer.)
Q. Were they Belmont police who picked you up?

Mr. Downs: Your Honor, this is his witness.

A. You say was it the Belmont police the ones that picked me up?
Q. Yes.
A. Yes, sir.
[fol. 146] Q. After they picked you up, what did they do with you?
A. They put me in jail.
Q. Do you know when they put you in jail?
A. Yes, sir.
Q. When?
A. That Monday night.
Q. About what time?

A. It was about 11:00, I believe, about 11:00 o'clock.

Q. Do you know whether they then found out later that you were an escapee from the prison camp in Haywood County, North Carolina?

Mr. Downs: Object unless he knows.

Mr. Bell: I asked him if he knows.

The Court: Read the question back, please, ma'am.

(Last question read by Reporter.)

The Court: Objection Overruled.

A. They must have found out, because they come over there and got me.

Q. No, I'm talking about the Belmont police. Do you know whether they found out that you had escaped from the prison camp up in the western part of the state?

A. No, sir.

Q. Did they ever say anything to you about it?

A. No, sir.

[fol. 147] Q. Do you know what county Belmont is in?

A. Gaston County.

Q. Do you know where the court house and the jail and where they try people for felonies in Gaston County?

A. Yes, sir.

Q. Where do they try them?

A. They try them at the city hall.

Q. In Belmont?

A. Yes, sir.

Q. What other town do they try them in in Gaston County, if you know?

A. Gastonia, I guess.

Q. Is Gastonia the largest town in Gaston County that you know of?

A. That I knows of, yes, sir.

Q. Now, while you were there in the Belmont jail, did some officers from Charlotte come over there?

A. Yes, sir.

Q. When did they come over there, if you remember?

A. They come over there and got me that same Monday night.

Q. They came over there when, now, that Monday night?

A. That same Monday night.

Q. About what time?

A. I don't know exactly what time it was. I know it was [fol. 148] getting pretty late, though.

Q. Now, when the officers from Charlotte came over there to see you, how long had you been in the jail there in Belmont?

A. I reckon about an hour or two hours or something, I reckon; I'm not sure.

Q. Well, what is your best estimate; would you say about two hours?

A. I'd say about two hours.

Q. Do you see the men in the building who came over there for you, if you know? Look over these gentlemen and see if you see anybody in here. Can he stand, Your Honor?

The Court: Oh, yes.

Q. Can you see anybody? Come back here a little closer, if you can.

(The witness pointed.)

Q. This man here?

A. Yes, sir.

Q. Who else?

A. That man.

Q. All right. And who else? Do you see any other man?

A. I think it was three or four. I can't remember the other two.

Q. But you remember those two men?

A. Yes, sir.

[fol. 149] The Court: Will you let the record show who he identified?

Mr. Bell: Yes, sir. He identified Mr. Holmberg. Stand up, Mr. Holmberg. What are your initials?

Mr. Holmberg: W. O. Holmberg.

Mr. Bell: You are the detective, W. O. Holmberg?

Mr. Holmberg: That's right.

Mr. Bell: And would you identify yourself?

Mr. Porter: Jack W. Porter.

Mr. Bell: You are a detective?

Mr. Porter: That's right.

Mr. Bell: Detective lieutenant?

Mr. Porter: No. Detective.

By Mr. Bell:

Q. Now, when they came over there to the jail, did they come there where you were and talk to you?

A. No, sir, they didn't even talk to me. They just come down there and put some handcuffs and leg shackles on me.

Q. What did they say to you?

A. Didn't say anything; just came out there and put me in the car.

Q. Did they say we are carrying you somewhere or hold out your hands, we want to put shackles on you?

[fol. 150] A. No, sir.

Q. Didn't say anything?

A. No, sir.

Q. So they put what on you, now?

A. Leg shackles and handcuffs.

Q. And after they got that apparatus on you, what did they do?

A. Put me in the car.

Q. Where were you seated in the car?

A. I was seated in the back seat.

Q. Who was back there with you, if anybody?

A. There was two back there.

Q. How many men were in the front seat, if you remember?

A. To my best knowledge it was four mens in the car.

Q. Two were in the back and two were in front?

A. Yes, sir.

Q. That is your best recollection about it?

A. Yes, sir.

Q. Well, where did they take you, if you know?

A. Carried me up to the city jail there in Charlotte.

Q. When they got you in jail, what did they do?

A. They didn't do nothing until the next morning.

Q. Where did they take you?

A. To the city jail, and put me in the cell.

Q. Did they take that stuff off of you?

[fol. 151] A. Yes, sir.

Q. What time was it, if you remember, that they put you in the cell?

A. It was beginning to get daylight, I remember that.

Q. All right. And you say nothing was done or said at that time?

A. No, sir.

Q. Now, the next day did you talk to somebody about it? Did somebody come up to the cell?

A. Yes, sir, I talked to Mr.—Where is Mr. McCall?

Mr. Bell: Captain McCall, will you stand up?

Q. Is this the man you talked to?

A. Yes, sir.

Q. What did he say to you?

A. He told me to sit down in a chair.

Q. Did they take you out of the cell, now, when you were talking with him?

A. Yes, sir.

Q. And where did they take you?

A. They carried me in a little room.

Q. Is that where the detectives and all those officers stay—their headquarters up there?

A. Yes, sir.

Q. They took you in a little room?

A. Yes, sir.

[fol. 152] Q. Did you sit down?

A. Yes, sir.

Q. How many men were there in the room, if you remember? Was it anybody other than Captain McCall?

A. I think it was about two in there.

Q. Two of them?

A. Yes, sir.

Q. Well, how many men took you out of the jail and carried you to Captain McCall?

A. Two come around there and got me.

Q. You don't know who they were?

A. No, sir.

Q. All right. Now, what did Captain McCall say to you, if you remember?

A. He asked me about that same crime.

Q. Well, what did he say, Elmer? Tell me in your own words what he said.

A. He said, "Do you know anything about this crime here?" I said, "No, sir." He said, "This crime looks like the type of crime that a man like you would do." And I told him, I said, "Why would you want to put this crime

on me for?" I said, "I ain't killed nobody." I said, "I ain't got no hate in my heart like that to kill nobody, especially an old woman." And he told me, say, "She was an old woman."

[fol. 153] Q. He told you that an old woman had gotten killed?

A. Yes, sir.

Q. Did he tell you what her name was; did you know at that time?

A. No, sir.

Q. Did he tell you you had killed her?

A. No, sir, he didn't say it in that exact words. He said he believed that I did.

Q. Well, what was your reply to that?

A. I told him I didn't do it. I told him I didn't know anything about it.

Q. Well, did you do it?

A. No, sir.

Q. Did you know anything about it?

A. No, sir, I didn't know anything about it until they started questioning me about it. I still don't know anything about it.

Q. How long did they keep you in there in his office that day, if you remember, in that room?

A. I stayed in there about forty minutes.

Q. Did they have these leg shackles on you and were you handcuffed at the time?

A. No, sir, not at that time, I wasn't.

Q. Do you remember how many men were up there that you saw in the room or in that division?

[fol. 154] A. At the time that they were questioning me?

Q. Yes.

A. It was two other mens in there.

Q. Did you see any other men around the door or in any of the other places in there?

A. Yes. Some were standing out there in the hall.

Q. Do you know whether or not all of them were armed or not? Did you see any guns on them?

A. I'm pretty sure they had their guns up underneath their coat.

Q. All right, after you had denied it and you remained in there about forty minutes, then what did they do?

A. Mr. McCall, he say, "We got to get this thing straight-

ened out once and for all, whether you did it or not," he say, "Somebody's got to pay for it," and then he say if I don't confess to this crime he is going to fram the hell out of me.

Q. Did he do anything to you then?

A. He smacked me around.

Q. Tell me what he did to you.

A. He smacked me up aside the head.

Q. What else?

A. Called me a black son of a bitch.

Q. Did it frighten you?

A. I was scared. I was scared the first time when they [fol. 155] told me it was a white woman, I done got scared. I didn't know but that they were going to take my life for a crime I didn't commit.

Q. Well, did you repeatedly deny it to them?

A. Yes, sir.

Q. You say he hit you, slapped you?

A. Yes, sir, slapped me.

Q. With his own hand?

A. Yes, sir.

Q. At the time that he slapped you, where were you sitting?

A. I was sitting in the chair.

Q. Then what happened?

A. I just sat there, and he told one of the jailers—I don't know if it was a jailer or not—I know he told one of the men to come in here and get "this nigger out before I kill him."

Q. Are those the exact words he said?

A. Those are the exact words he said.

Q. Did somebody come in and get you?

A. They come and get me and put me back in the cell.

Q. Now, when they first carried you up to the jail, do you remember what part of the jail they put you in?

A. Yes, sir. They put me on the first part of the floor as you come up the steps. I guess that's the second part, [fol. 156] the second floor.

Q. Now, the next morning did they give you anything to eat?

A. I got one sandwich.

Q. Who brought it to you, if you know?

A. I don't know for sure who brought it. I know I got one sandwich.

The Court: Now, when was this? You say the next morning?

Mr. Bell: Yes, sir, after he had been placed in the Charlotte city jail.

Q. After you were beaten and slapped there and cursed, you were put back in the cell; is that correct?

A. Yes, sir.

Q. Do you remember the nex time some officers came to see you?

A. They come to see me every day.

Q. What do you mean by every day—all day and all night?

A. Most all the time through the day and most all the time through the night.

Q. Well, what would they say to you when they'd come to see you?

A. Sometimes they would tell me, "We are going to get this thing straightened out"; said, "We've got to get it straightened out"; say, "Somebody got to pay for this [fol. 157] crime whether you did it or not."

Q. Did you repeatedly tell them that you didn't know anything about it and that you had not committed the crime?

A. Yes, sir. I told them that I didn't know anything about this crime whatsoever. I told them if I had did the crime, I'd be honest with them. You understand? I don't mind taking my punishment; don't let me take the punishment for somebody else.

Q. How long did you stay down on that first floor of the jail, if you know?

A. To the best of my knowledge I stayed down there about a week.

Q. Did they take you out of the jail?

A. Yes, sir.

Q. Do you know who came and took you out? I'm talking about out of the jail building.

A. Mr. Porter. Mr. Holmberg came there one time.

Q. These two men back here, the ones who stood up a few minutes ago?

A. Yes, sir.

Q. Mr. Porter and Mr. Holmberg. Was anybody else with them at that time?

A. Not at that time?

Q. Where did they carry you?

A. They carried me to the cemetery.

[fol. 158] Q. Did they make you go out there to the cemetery?

A. They come in there and got me and put handcuffs on me and leg shackles.

Q. And what did they say?

A. Said, "Come on. We're going to take a ride out to the cemetery."

Q. Did you ask them to go out there?

A. No, sir. I was in there laying down when they come in there and got me.

Q. Did you tell them you didn't want to go out there?

A. I told them, I say, "I don't see no use for me to go out there, 'cause I ain't did nothing for me to go out there for."

Q. Did they take you out there in an automobile?

A. Carried me out in an automobile?

Q. What happened after you got out there to the cemetery?

A. They went round and around twice. They said, "Davis," say, "take a good look around"; said, "Is there anything unusual that you remember out here?" I says, "No, sir, I don't remember nothing out here."

Q. Did they stop the car?

A. Yes, they stopped the car.

Q. Did they make you get out?

A. No, sir, we didn't get out.

Q. Then what happened?

[fol. 159] A. They they rode around, and they brought me back to the city jail.

Q. Well, after you got to the jail, where did they take you?

A. Carried me back and put me in that same cell.

Q. Do you know about what time of day this was?

A. It was in the evening time; I don't know exactly what time it was, though.

Q. Well, what kind of shackles did they put on you?

Mr. Bell: Where is the officer who brought them in here? Let me see those shackles.

Q. Did they put some apparatus like this on you?
A. No, sir. It was leg chains and handcuffs.
Q. Well, were both of your legs chained together?
A. Had a cuff on this leg and a cuff on this leg, and a chain.
Q. Well, what kind of cuff was on your leg?
A. Looked to me it was steel?
Q. Was it made out of metal?
A. Yes.
Q. Did it fit tight around your legs?
A. Yes, sir.
Q. How wide was it?
A. I'd say about something like that.
Q. I'm talking about how wide were these two cuffs [fol. 160] chained together?
A. Had a cuff on this leg and a cuff on this leg, and a chain.
Q. Well, how wide was the chain?
A. About like that.
Q. Stand up. And you could step about how far?
A. About something like that. I had to walk like that.
Q. Now, did they have this pair of handcuffs on you?
A. Yes, sir.

Mr. Bell: Your Honor, I would like for him to stand up and show the distance he could step.
The Court: I just saw him do that. Do you want to stipulate about the length that he says this chain was?

Q. How long do you say the chain was, Davis?
A. Just as far as I could take a step like that, you understand. I had to walk like that.

The Court: Of course, that means nothing for the record.

Q. Well, how long was the chain?
A. About like that.
Q. Would you say that is about twelve inches?
A. Yes, sir.
Q. You say both of these men brought you back to the jail after you went out there and rode around a few minutes?

[fol. 161] A. Yes, sir.

Q. Did they say anything else to you right then?

A. No, sir.

Q. After they brought you back?

A. No, sir.

Q. Well, later on that night or any night did they come in to see you?

A. The same ones come back every other night sometimes. Oh, it was just the same thing over and over.

Q. How often were you interviewed or interrogated by these detectives?

A. Every day and night.

Q. How often; how many times a day would you say?

A. Sometimes two times in the morning and about two times at night.

Q. Now, what do you mean—late in the morning, after 12:00 or 1:00 o'clock?

A. Yes, sir.

Q. Two or 3:00 o'clock in the morning?

A. Yes, sir.

Q. Well, what would they do?

A. Well, they'd come in there and question me about the same thing, about this crime, and asking me am I going to confess to it.

Q. Well, during the time they would talk to you, did they [fol. 162] scare you?

A. I was scared when they first mentioned it to me, when they said it was a white woman.

Q. Were you able to sleep?

A. No, sir.

Q. Why?

A. Scared.

Q. Did they wake you up and bring you out of the jail all times of night?

A. Yes, sir.

Q. Where would they take you late at night?

A. Sometimes just ride me around.

Q. Take you out of the building?

A. Yes, sir.

Q. Now, Elmer, did they take you out to the cemetery at night?

A. Yes, sir.

Q. About how many times?

A. I think they carried me out there three times.

Q. Did you have these cuffs on you?

A. Yes, sir.

Q. These leg chains?

A. Yes, sir.

Q. Were you handcuffed?

A. Yes, sir.

[fol. 163] Q. Were you taken out there by different officers?

A. By different officers, yes, sir.

Q. Do you remember anything that happened out there at the graveyard at night between you and the officers; can you tell the Court, if you remember anything that happened?

A. Yes. They told me, said, "Davis," said, "we've found that lady's pocketbook and eyeglasses what belonged to her." And they carried me to a hedge where they say they found it.

Q. Now, this was in the nighttime?

A. Yes, sir. And they asked me did I know anything about this pocketbook and glasses. I told them, "No, sir, I don't know anything about it."

Q. Well, did they ever mistreat you out there at night out there at the graveyard?

A. Oh, they slapped me.

Q. Did they say anything abusive to you?

A. The same thing over and over, "Nigger, nigger," stuff like that.

Q. Did they curse you?

A. Yes, sir.

Q. What did they call you, if you remember any words that they said?

A. Called me a black son of a bitch.

Q. So you stayed down there on the first floor of the jail, [fol. 164] you say, about a week?

A. Yes, sir.

Q. Now, then, did they take you in another part of the jail?

A. Yes, sir, they carried me upstairs.

Q. How long did you stay up there, if you know?

A. I stayed up there until the time they come in and got me and carried me down there for a hearing.

Q. Carried you down where?

A. Down to the city jail.

Q. For a hearing?

A. Yes, sir.

Q. Now, during this whole time, Elmer, that you were in jail, did you every try to see anybody?

A. Well, I asked the people in there what about getting the phone book. I say, "I don't know my sister's address or phone number either one." I say, "What about you all looking in the phone book and see can you find it. If you would, I would appreciate it very much if you all can get in touch with her, because I want to see her.

Q. What did they say?

A. And he asked me, said, "What do you want to see her about?" I said, "I want to tell her that these people up here done beat me and done made me confess to a crime that I don't even know anything about." I say, "I'm just scared."

[fol. 165] Q. Now, I hand you this paper here and ask you did you write your name down there? Is that your name?

A. Yes, sir.

The Court: Now, what paper are you showing him? Let's mark it for identification?

Mr. Bell: I am showing him a piece of a purported confession.

The Court: Well, you asked him about a certain page. Do you wish to let the record show what page he is looking at?

Mr. Bell: Yes, sir. He is looking at Page 2.

Q. Now, when you wrote your name, who told you to write your name down there, if anybody?

A. Mr. McCall told me to go ahead and sign the paper.

Q. I mean he told you to sign it?

A. Yes, sir.

Q. Did you ask him to sign it?

A. No, sir.

Q. Did you ever confess to anything?

A. No, sir.

Q. Did you ever tell Captain McCall or any other mem-

ber of the Detective Division that you had killed the late Fy Bell Cooper and wanted to confess?

A. No, sir.

Q. Did they read that paper to you?

[fol. 166] A. I don't know if they read this part here or not.

Q. Can you read?

A. (No answer.)

Q. Do you see anything on that page, Elmer, that mentions anything about you killing anybody?

A. No, sir.

Mr. Bell: Your Honor, I would like to have this marked for purposes of identification, this sheet separately, and introduce it in evidence to illustrate the testimony of the petitioner.

(Page 2 of statement of Elmer Davis, Jr., concerning murder of Mrs. Foy Bell Dixon Cooper on September 20, 1959, marked Petitioner's Exhibit No. 2.)

Mr. Downs: We object to introducing this second page. Mr. Bell hasn't introduced——

Mr. Bell: I am going to introduce this too.

The Court: You have marked the second page Petitioner's Exhibit 2?

Mr. Bell: Yes, sir.

The Court: All right.

By Mr. Bell:

Q. Now, Elmer, I hand you another piece of paper and ask you have you ever seen that before other than up there in the trial in the Superior Court of Mecklenburg County? [fol. 167] Did anybody read that to you?

A. Ain't nobody read this to me. This is the second time I ever saw it. I saw it in the Superior Court and here.

Mr. Bell: Your Honor, I would like to mark this Petitioner's Exhibit No. 3.

The Court: Very well.

(Page 1 of statement of Elmer Davis, Jr., concerning the murder of Mrs. Foy Bell Dixon Cooper on September 20, 1959, marked: Petitioner's Exhibit No. 3.)

Mr. Bell: And I would like to introduce it into evidence for the purpose of illustrating the testimony of the Petitioner.

The Court: I understand. Now, you introduce both pages as Exhibit 2 and Exhibit 3?

Mr. Bell: Yes, sir. Your Honor, I would like to read this for the purpose of the record.

The Court: Very well.

Mr. Bell: (Reading from P-3) "Charlotte Inter-office Communication. Date: October 6, 1959. To File. Subject: Statement of Elmer Davis, Jr., Concerning the Murder of Mrs. Foy Bell Dixon Cooper on September 20, 1959."

[fol. 168] (At this point Mr. Bell read the first page of the statement, heretofore marked Petitioner's Exhibit No. 3, deleting obscene language on Line 7 of the second paragraph and Line 7 of the third paragraph.)

Mr. Downs: Your Honor, at this point we would like for the Court Reporter to read first paragraph of the paper as read by Mr. Bell. The last line says "it can be used against me or for me in a Court of Law." We may be mistaken, but I don't believe that I heard the words "or for me," and I would like to have the Reporter read it back to see if those words are in the record.

The Court: Very well.

(Reporter read from stenotype notes first paragraph of statement as read into the record by Mr. Bell, ending "it can be used against me in a Court of Law.")

Mr. Downs: ". . . or for me . . ."

Mr. Bell: It's in there, "or for me".

Mr. Downs: Yes, sir, but it is not in what you read.

The Court: Very well.

Mr. Downs: Your Honor, may we have "or for me" inserted between the words "used against me or for me in [fol. 169] a Court of Law," have those three words inserted?

The Court: Do I understand those words appear in the original?

Mr. Bell: Yes, sir.

The Court: Very well.

By Mr. Bell:

Q. Elmer, you didn't sign this paper?

A. I didn't sign that paper.

Q. And it was never read to you?

A. No, sir.

Q. You had never seen it before you got up in Mecklenburg County and they tried you in the Superior Court?

A. No, sir, I hadn't seen it.

Q. Now, Elmer, I want you to tell the Court why you signed that other paper.

A. Well, they told me, say, "If you sign this paper here," say, "we'll see that you go to the city jail and get something to eat."

Q. Were you hungry?

A. Yes, I was hungry.

Q. Did you go to the city jail or the county jail?

A. I mean the county jail.

Q. Were you hungry?

A. Yes, sir.

Q. How long had you been up there in the city jail?

[fol. 170] A. Sixteen days, I guess.

Q. Had anybody given you any cooked food, hot food?

A. Mr. Hucks give me some cooked something to eat.

Q. I believe Mr. Hucks carried you to his house?

A. Yes, sir.

Q. And after having told him you were hungry, he carried you home and gave you simething to eat?

A. Yes, sir, because we were going back up to Asheville.

Q. They were taking you up to Ashville?

A. Yes, sir.

Q. Who took you—Mr. Hucks and who else?

A. Mr. Hucks and—I guess—is your name Mr. Fesperman? Mr. Fesperman.

Q. Anybody else with you?

A. No, sir, just us three.

Q. What did you go up there for?

A. Well, we had some clothes and things, what I took up there, and we wanted to go up there and get it straightened out; but the place where I took the stuff I couldn't locate the place because it was at night, you understand, when I took the clothes and things off the line.

Q. You did take some clothes up there?

A. Yes, sir.

Q. New, Elmer, I believe you did take some shoes, is that correct?

[fol. 171] A. Yes, sir.

Q. Where did you take these shoes?

A. The guy he was laying down there down beside the railroad down below the train station.

Q. Well, was he asleep or drunk or what?

A. I guess he was drunk.

Q. Well, where were the shoes?

A. The shoes were laying over there in the grass.

Q. Why did you take them?

A. Because mine were heavy.

Q. What kind of shoes did you have on?

A. State shoes.

Q. Prison shoes?

A. Brogans, yes, sir.

Q. Did you put those shoes on?

A. Yes, sir.

Q. What did you do with yours?

A. I left them down there.

Q. You said that these officers continued to question you day and night the whole time you were in jail?

Mr. Downs: I object to that.

The Court: Yes, I think he has been into that.

A. Yes, sir.

Q. Now, do you remember what day you did sign that paper, that second sheet there?

[fol. 172] A. No, sir, I don't remember.

Q. Well, was that the day you did talk to Lieutenant Sykes?

Mr. Bell: Is Lieutenant Sykes in here? Will you stand up, Lieutenant, so he can see you?

Q. Did this man pray in there?

A. Yes, sir.

Q. He did pray in there. That was the day that you talked to him that you did sign it?

A. Yes, sir.

Q. Well, did you ever tell Lieutenant Sykes you killed anybody?

A. I ain't told nobody I killed that woman.

Q. You didn't tell him?

A. No, sir.

Q. Well, what about this praying business, what did he do?

A. He asked me did I want him to pray. I told him, I say, "I have no objection against your prayers." I said, "I love prayers," I say, "because I'm part Christian my own self," I say. "All my people are Christians."

Q. Did he pray?

A. Yes, he prayed.

Q. All right. Had you seen Lieutenant Sykes before this?

A. No, sir. That's the only time I saw him.

[fol. 173] Q. That was the first day you had seen him?

A. Yes, sir.

Q. Now, do you remember Dr. Tross coming up there?

A. Yes, sir.

Q. What did he say to you, if you remember?

A. He come in there and said, "Hi, Elmer." I said, "Hi." He said, "I heard about the trouble that you was in."

Q. Well, did he pray?

A. Yes, he prayed. After he said he heard about the trouble that I was in, he didn't go into no detail no further.

Q. Did you confess anything to him?

A. No, sir.

Q. Did you tell him you had killed somebody?

A. No, sir.

Q. Now, Elmer, when you signed that second sheet of paper here that you admit your name is on, do you know how many people were around there when you put your name on there? Do you know how many officers were around there, Elmer?

A. I guess all of them was in there.

Q. Were they in the little room, or in a——

A. In that same room.

Q. Were all of them armed; did they have pistols on them?

[fol. 174] A. Yes, sir.

Q. Were you afraid?

A. Yes, sir.

Q. Did they abuse you that day when you signed the paper?

A. I looked like I wasn't going to sign the paper, you understand, so they say, "Go ahead and sign the paper so we can get through with it."

Q. Is that the reason you signed it?

A. Yes, sir.

Q. Did you sign it because you were afraid?

A. I signed it because they say they are going to kill me.

Q. Did they promise to give you some food?

A. When I got to the county jail.

Q. Now, after you signed this paper, Elmer, and had talked to Lieutenant Sykes and Dr. Tross, did they take you down there in the Courtroom in the City Court House?

A. (No answer.)

Q. Up there in the same building the jail was in. Did they take you out in the Courtroom the next day or two?

A. Yes, took me the next day.

Q. Do you know who took you in there; do you remember it?

A. Yes, sir.

Q. Who was it?

A. Mr. Hucks and Mr. Fesperman.

[fol. 175] Q. Did you have any lawyer?

A. No, sir.

Q. Had you called for a lawyer?

A. I had been asking for one the whole time I was in there.

Q. Would they ever let you see a lawyer?

A. No, sir.

Q. Did they let you see your sister?

A. When I got to the county jail.

Q. Did they ever let you see your sister or anybody else while you were in the city jail?

A. No, sir.

Q. Did you ask the officers from time to time to let you see somebody?

A. I did.

Q. What did they tell you?

A. "We are not going to let you see anyone until we get this mess straightened out."

Q. From the time you went to the city jail until you got over to the county jail, did you ever talk to any lawyer?

A. I ain't seen no one. It was about three months before I saw a lawyer.

Q. Do you know what it means when they say you waive a hearing; do you know what that means?

A. Yes, sir.

[fol. 176] Q. You know what it means? What does it mean?

Mr. Downs: Object, now, your Honor. He said he did.

Mr. Bell: I asked him, "What does it mean?"

Q. What does it mean, Elmer?

The Court: Objection overruled.

A. I guess it's when someone is waiving a hearing for you.

Q. Now, Elmer, when you went down there in the Courtroom, did you have a conversation with Mr. Porter—Mr. Hucks? Did you say Mr. Hucks went down there with you?

A. Yes, sir.

Q. And Mr. Fesperman?

A. Yes, sir.

Q. Did they talk to you about waiving a hearing?

A. They asked me, say, "Is you going to waive the hearing?" I said, "No, sir, I'm not going to waive the hearing."

Q. Then what happened?

A. So they waived it. I didn't tell them to waive it. They waived it their own selves.

Q. Did they allow you to say anything in the Courtroom?

A. No, sir, I didn't say anything.

Q. Did you hear them tell the Solicitor that they waived the hearing for you?

[fol. 177] A. Yes, sir, I did.

Q. Before then, did you ask them to let you see a lawyer?

A. Yes, sir, I had been asking them.

Q. So you went in the Courtroom and in that preliminary hearing you were by yourself?

A. Yes, sir.

Q. When you went in there, did they tell you what you were charged with?

A. They read it off. I think it was the same thing we are talking about here, murder and rape.

Q. All right, now, after the preliminary hearing and you went back there to the jail, do you know how long you remained in jail, in that city jail?

A. I went to the county jail that same evening.

Q. Who took you over there, if you know?

A. The same two, Mr. Hucks and Mr. Fesperman.

Q. Did they say anything to you when they were taking you over there to the county jail?

A. Well, they told me to go up there and be good. That's all.

Q. Did they tell you they were going to try to help you out?

A. Yes, sir. They told me, say, "If you go in there in the Courtroom and get ready to be tried and," say, "you plead guilty to this crime," say, "you'll get a life sentence." [fol. 178] That's what they said.

Q. Now, Elmer, how long had you been in the Mecklenburg County jail before your sister came up there, if you remember?

A. I can't remember.

Q. Well, did your sister come up there to see you?

A. Yes, sir.

Q. What did you tell her?

A. I told her, I said, "I signed a paper."

Q. Did you tell her why you signed it?

A. I said, "Because I was afraid, and them people hit me up aside the head and called me a black son of a bitch," and said, "if I didn't sign it," they said, "they were going to kill me." I said, "Because I heard tell of cases like this what they got me charged with," you understand, "that people get killed in whether they did the the crime or not."

Q. Did you tell her that you did not kill Mrs. Cooper?

A. I told her that I did not kill anyone.

Q. Did she ask you whether you did it or not?

A. Yes, sir.

Q. Did she tell you that she had been trying to see you and that the officers wouldn't let her see you?

A. Yes, she told me that.

Q. Did she come back to the jail after that time?

A. Not that I knows of.

[fol. 179] Q. Now, when you got over to the county jail, did they serve you a different kind of food?

A. Beans, white potatoes, meat, milk, cabbage—stuff like that.

Q. Did you get that kind of food over at the city jail?

A. No, sir.

Q. What did you get over there?

A. Sometimes I got one sandwich; most of the time I got one.

Q. Is one of the reasons you signed that confession, that paper, because you were hungry?

A. I signed that paper to get away from them people over there because I was scared of them.

Q. Were you hungry?

A. Yes, sir.

Mr. Downs: I object to that. He has answered that question.

Q. Had you been able to sleep over there any at all, Elmer, in that city jail?

Mr. Downs: Objection. He has answered that.

A. I didn't have a night's sleep the whole time I was over there.

Q. Elmer, when did you first see a lawyer in this case?

The Court: I believe he said three months, didn't he?

[fol. 180] A. I think it was three months.

The Court: Let's try not to repeat, if we can.

Q. Who came to see you?

A. You and Mr. Nivens.

Q. Did we tell you who had sent us up there to see you?

A. You say a Mr. J. P. Campbell.

Q. Did we tell you that a judge had sent us up there to see you?

A. Yes, sir.

Q. And that's the first time that you had talked to any lawyer, when you talked to Mr. Nivens and me?

A. Yes, sir.

Q. How often were you fed up there at the county jail?

A. Three times a day.

Q. What time did you get your first meal?

A. About 5:00. I think about 5:00 in the morning.

Q. And the next one?

A. Twelve.

Q. The next one?

A. About 6:00, 6:00 or 5:00.

Q. Was all of this hot food?

A. Yes, sir.

Mr. Bell: All right, examine him.

The Court: Mr. Marshal, we will take a recess until tomorrow morning at 9:30.

[fol. 181] (Whereupon, a recess was taken at 5:45 P. M., Wednesday, February 20, 1963, until 9:30 A. M., Thursday, February 21, 1963.)

Morning Session

The Court: You had completed the direct-examination, I believe?

Mr. Bell: Yes, sir.

Cross-examination.

By Mr. Downs:

Q. Davis, did you say on direct-examination to your counsel that you had nothing to go back out near Elmwood Cemetery in the City of Charlotte for?

A. Said I didn't have anything to go out there for?

Q. That's right.

A. No, sir.

Q. I'll ask you if you did not take a pocketbook from a man named Hayes and take his shoes when he was lying within seventy-five feet of Elmwood Cemetery?

A. He wasn't close to that cemetery.

Q. Well, he was right across the railroad track from it, wasn't he?

A. No, sir, he wasn't there.

Q. Where was he, then?

[fol. 182] A. He was down below the train station.

Q. You mean down below West Trade Street?

A. On one side.

Q. I'll ask you, Davis, if you had not worn these prison shoes that you discarded in the City of Charlotte all the way from Haywood County to the City of Charlotte?

A. I did.

Q. And you walked all the way, hadn't you?

A. All the way from where?

Q. From Haywood County to Charlotte.

A. No, sir.

Q. How much of the distance had you walked?

A. I walked all the way to Asheville.

Q. Well, how did you get from Asheville to Charlotte?

A. On the train.

Q. Well, I believe you say you came to Hickory, didn't you?

A. I came to Hickory on the train.

Q. How did you get from Hickory to Charlotte?

A. On a bus.

Q. You mean a public bus?

A. Yes, sir.

Q. You still had on these convict shoes?

A. Yes, sir.

Q. Don't you know, Davis, the reason you wanted another [fol. 183] pair of shoes to on there in the Elmwood Cemetery is that you had been in that very cemetery with those convict shoes on and had walked on the soft ground with them, hadn't you?

A. No, sir.

Q. I'll ask you while these officers were examining you from the period of the 21st of September, 1959, to October the 6th, 1959, they never once during that time mentioned to you about a murder of any type?

A. They had mentioned that murder the second day that I was in there.

Q. Well, they never mentioned to you that a white woman was murdered, did they?

A. Yes, they did.

Q. I believe you said that Captain McCall assaulted you, is that correct?

A. He slapped me.

Q. Did anyone else assault you?

A. Yes.

Q. Who else assaulted you while you were there in the Police Department from September 21st?

A. That man right there did.

Q. Which one are you pointing to?

A. Them two men what carried me to the cemetery.
Q. Well, Mr. Holmberg and Mr. Porter?
[fol. 184] A. Yes, sir.

Mr. Bell: Can they stand up, Judge, so we can see them?
The Court: Yes, sir.

Q. Who else do you say assaulted you?
A. It was so many come in there I couldn't remember the rest of thems names.
Q. Well, just name some of them or point some of them out if they are here in the Courtroom.
A. Ain't any of the rest of them in here.
Q. Nobody else is in this room then, you say, that assaulted you while the time you were incarcerated in the City Police Department from the 21st of September, 1959, to October 6, 1959; is that correct?

Mr. Bell: Your Honor, will you ask the Solicitor to rephrase that statement? I did not understand it.
The Court: (To Reporter) Well, read it back.

(Last question read by Reporter.)

By the Court:

Q. Do you understand that question?
A. Yes, sir. The same officers kept coming to the cell, the same officers.

By Mr. Downs:

Q. I'm asking you about assaulting you, putting their [fol. 185] hands on you.
A. That's what I'm telling you now; I'm explaining it the best I could.
Q. The same officers kept assaulting you; is that what you say?
A. Yes, sir.
Q. And that was Mr. Holmberg and Mr. Porter?
A. Yes, sir.
Q. And Captain McCall?
A. Yes, sir.
Q. And those are the only three that assaulted you?
A. No. There was some more come in there.
Q. Well, what I'm asking you, Davis——

Mr. Downs: All these officers stand up, every one of them

Q. I ask you to look this group of officers over and——

Mr. Bell: May I say this? Your Honor, he has already stated to the Court plainly that these three men, Mr. McCall, Mr. Holmberg, and Mr. Porter, are the only officers in this room who ever assaulted him. He has already stated that to the Court, and he stated it plainly .

The Court: I understand. Objection overruled. Now, complete your question.

[fol. 186] By Mr. Downs:

Q. And see if you see any other officer who you say assaulted you.

A. No, sir. I said they was the only three.

Q. All right, did any of these other officers here in this room ever threaten you in any way?

A. Yes, sir.

Q. Which one of them threatened you?

A. What I would call a threat, like cussing and stuff like that.

Q. Well, did any of these other officers say they were going to fram hell out of you?

A. Yes, sir.

Q. Which one?

A. That same man there.

Q. Mr. Holmberg and Mr. Porter?

A. That one right there.

Q. Now, are those the only ones?

The Court: Just a moment. I don't know who he is talking about.

A. That man.

Q. Are these the only two that ever——

The Court: Just one minute. I still haven't gotten it clear.

[fol. 187] By the Court:

Q. Were there one or two of the men that you are talking about now?

A. I was talking about that man.

Q. One? The one in front or the one behind?
A. The one in front.

The Court: Now, can it be stipulated who he is referring to?
Mr. Downs: Detective Porter.
Mr. Bell: Detective Porter and Holmberg.

By Mr. Downs:

Q. Is Detective Porter the only one that told you he would fram hell out of you?
A. He'd fram the hell out of me.
Q. I say is he the one that told you that?
A. Yes, sir.
Q. I'll ask you, Davis, if when this matter was heard in Superior Court in Mecklenburg County in 1959 that you only pointed to two men, and you identified one in a blue suit and one in a gray suit as being the men that threatened you?

Mr. Bell: We Object to that, Your Honor. He has no record or nothing in front of him.
The Court: Objection overruled. He is asking him.
Mr. Bell: He has no record or anything in front of him. [fol. 188] This matter was heard four years ago in the Superior Court of Mecklenburg County. He's talking about two.
The Court: He either knows or he doesn't know. And he can say either. Objection overruled.
Mr. Downs: I would like to have the Reporter read the question to him.

Q. (Read by Reporter) I'll ask you, Davis, if when this matter was heard in Superior Court in Mecklenburg County in 1959 that you only pointed to two men, and you identified one in a blue suit and one in a gray suit as being the men that threatened you?
A. I don't think I remember saying that in Court.

By Mr. Downs:

Q. I'll ask you if you didn't also say in Superior Court of Mecklenburg County that Lieutenant Sykes threatened you.
A. I didn't say he hit me.

Q. I'm asking you if you didn't say he threatened you.
A. He said——

Mr. Bell: We Object to that, Your Honor.
The Court: Objection overruled.

Q. Answer the question.
A. I explained myself, sir. I say he said it, but he didn't.
Q. Well, didn't I ask you a little bit ago was there any [fol. 189] other officer in this room that threatened you, and you only pointed to Detectives Porter and Holmberg?
A. You hadn't gotten to that question then, sir.

Mr. Downs: Stand up, Mr. Sykes.

Q. Mr. Sykes stood up a little bit ago, and you did not point him out as being one of the men who threatened you in any way; isn't that correct?
A. (No answer.)

Mr. Downs: Your Honor, will you ask him——
Mr. Bell: Your Honor, may I say something about this case?
The Court: Yes, sir.
Mr. Bell. The Petitioner in this case has already explained to Mr. Downs and this Court his concept of "threat." He said "threat" to him meant cursing and using other abusive language. That is what he has already told, so far as any physical——
The Court: Well now, he has, you say, his own concept of what "threat" means. Now the attorney, as I understand it, is asking him if anybody threatened him. Now, he can interpret and construe that word within his own concept of what the word means. Objection Overruled. Read the question.

(Question at line 5 above read by Reporter.)

(No answer from the witness.)

[fol. 190] The Court: Answer the question, if you understand it.

A. Well, I just then explained it to him. I said when I said "threaten," I mean cussing.

The Court: Ask him another question.

By Mr. Downs:

Q. I'll ask you, Davis, if in the Superior Court of Mecklenburg County when this matter was heard in December, 1959, if you were not asked the following question which appears on Page 106 of the transcript:

"Q. Had any of them told you they would kill you?
"A. That man right there he told me, he say."

Is that in the transcript right there?

Mr. Bell: Your Honor, we Object to this, and I would like to be heard.

The Court: All right.

Mr. Bell: In the beginning of this trial we asked that all the records and testimony, including the hearings, be admitted in the record as evidence; and it is in evidence that this man cannot read well; and Mr. Downs is handing him a pamphlet now for him to read, knowing that it's in evidence that he cannot read—not well. And we are saying it has a tendency to confuse this man.

The Court: Well, it is my recollection that you offered [fol. 191] in evidence the entire record in all former proceedings in the State and Federal Courts. It is also my recollection that you have used the transcript of evidence in your cross-examinination of witnesses heretofore in this hearing. I would presume and I so hold that counsel for the Respondent has the same right to use the transcript, which is in evidence, in the cross-examination of witnesses. The objection is Overruled.

By Mr. Downs:

Q. Take the transcript and see if it doesn't say that right there.

A. I can't read.

Q. I'll ask you if the next question isn't: "Which one?" And you say: "The one in the blue and gray, that one in the gray suit."

You never identified but one man in that Courtroom as ever threatening you in any way; isn't that correct?

A. No, sir, it's not.

Q. I'll ask you also if it doesn't appear on Page 119 of

the transcript, and Lieutenant Coy Sykes stood when you were answering this question:

"Q. Stand up. You say Mr. Coy Sykes, the gentleman standing right there, did anything to you?

"I told you that he said a while ago.

[fol. 192] "Q. Did he ever strike or hit you or use any force against you whatsoever?

"A. I told you he told me——

"Q. Just answer the question."

And you say, "Yes."

You said Lieutenant Sykes hit you too, didn't you?

A. I didn't say Lieutenant Sykes hit me, no.

Q. Did you say that Lieutenant Sykes threatened to fram hell out of you?

A. I say he threatened me.

Q. Well, why didn't you identify him a little bit ago, Mr. Davis?

A. Because you didn't ask me.

Q. I had all the officers to stand and asked you did any of them threaten to fram you, and Lieutenant Sykes is one of the ones that stood, wasn't he?

A. If you had asked me him personally, I would have told you.

Q. I asked you to point out any of them, didn't I? Didn't I ask you to point out any of them?

A. Yes, sir. I answered to the best of my knowledge as I could.

Q. I believe you said that the reason you signed that paper, which is identified as Petitioner's Exhibits 2 and 3, was that you say these officers threatened to kill you?

[fol. 193] A. They did.

Q. And when you were asked about that in the Superior Court of Mecklenburg County, I'll ask you if you didn't tell your lawyer, Mr. Bell, the following:

"Q. What did he say? Tell the exact words he said to you.

"He said, 'Davis,' he said, 'if you sign this paper,' he said, 'we will see that you get in the county jail where you can take a bath and something to eat,' and I said, 'Okay.'"

The next question was: "Well, when you signed the paper, did you think you were connected with any crime?" And you say: "No."

The very reason you say you signed that paper was that you were going to be sent to the county jail to get food and a bath, and that's the only reason you said you signed it?

A. I signed the paper because he told me to sign it. So I signed it. I knowed it wasn't no way out, so I had to sign it. I couldn't rest, and I was scared; and that was a white woman they had me for. And the next time they have me accused of something like that and they come in there and threaten me like that, I'm going to sign it.

Q. Well, I'll ask you, Davis, if at the time you were confined in the county jail if Mr. Brewer, the deputy sheriff in the county jail, did not talk to you from time to time—[fol. 194] Mr. A. J. Brewer, the county jailer?

A. County jail?

Q. The county jailer, Mr. Brewer.

A. Yes, sir, he talked to me.

Q. And I'll ask you if you didn't tell him on more than one occasion that you wanted to plead guilty to this crime and take a life sentence?

A. No, sir, I didn't. He come in there and ask me, he said, "Davis, is you going to plead guilty to this crime?" I said, "No sir, I'm not going to plead guilty to this crime."

The following morning then I went down to be tried and another officer, he asked me, said, "Davis, you just as well go ahead and plead guilty to this crime whether you did it or not, and go ahead and get it off, because the odds is against you."

Q. Now, Davis, in relationship to the pocketbook of Mrs. Foy Bell Cooper, I'll ask you this question: that if you did not go down to the cemetery, Elmwood Cemetery, and show these officers where Mrs. Cooper was sitting, where you placed her behind the monument, and where you placed her in the mausoleum; and that's all you ever showed the officers down at Elmwood Cemetery?

A. No, sir, I didn't. They showed me.

Q. I'll ask you if you don't know in relationship to that [fol. 195] pocketbook that you never showed the officers where it was; it was found by some city maintenance

workers in the bushes, and you never did take the officers to this bush, and they never did take you there?

Mr. Bell: We object.

A. Yes, sir, they did.

Mr. Bell: We object to that, Your Honor. He has already told Mr. Downs that he didn't show them anything; that they showed him.

The Court: Well, he is being cross-examined. Objection overruled.

Q. Davis, you have been in Court and been tried and convicted of various offenses, haven't you?

The Witness: Your Honor, do I have to answer that question? This is in the past.

The Court: Well, the only pertinence of the queestion would be an attack upon the credibility. Is that the purpose of your question?

Mr. Bell: Your Honor, we object.

Mr. Downs: Your Honor, I would like to show his experience in Court and whether or not he would be afraid during the time he was being investigated if he had committed other crimes.

Mr. Bell: We object. Your Honor, may I be heard?

[fol. 196] The Court: Yes.

Mr. Bell: Your Honor, the only question before this Court, as I understand it, is that this Court is investigating the voluntariness of this confession. That's the only question before the Court. What Davis has done in the past is not germane to this interrogation.

The Court: Well, if what he has done would have a bearing upon his credibility, would it not be germane?

Mr. Bell: No, sir, I don't think so.

The Court: Do you not think that the credibility of any witness in any sort of an inquiry is always a relevant consideration?

Mr. Bell: Well, what I think the State is trying to do is get into this record some previous offenses that this man has been connected with.

The Court: It occurs to me that the only competent evidence with respect to former offenses would be evidence

as to the type of offense, which might be held to affect the witness's credibility.

Now, I will hear from counsel for the Respondent with respect to this. You asked him a general question.

[fol. 197] Mr. Downs: Yes, sir, a foundation question for a follow-up as to his knowledge of certain court proceedings: if he had ever been in court before and had he ever gone through certain proceedings before.

The Court: Well, now, how is that relevant to this particular——

Mr. Downs: He contends that he did not know what "preliminary hearing waived" meant on this particular piece of paper, and we would like to show or at least we would like to ask him had he not ever waived a hearing in some Recorders Court before on some other offense.

The Court: Now, is that, though, material on the issue before the Court at this time—his experience in the waiving of preliminary hearings?

Mr. Downs: I would assume by the line of questioning by Mr. Bell that he is going to contend that he was without counsel at that time and didn't know what he was doing; and that is one of their attacks, apparently, on this proceeding.

The Court: Well, are they attacking the waiver of the preliminary hearing?

Mr. Downs: Well, they stress the fact that he didn't have counsel and they want it to appear that the officers waived [fol. 198] the hearing for the man. I want to show or at least ask him had he been in Recorders Court before and knows what a preliminary hearing is. It is not really important, but he leaves the impression that he didn't know what was going on down there, and that is the only reason I was asking him the question.

The Court: I don't believe that I will permit inquiry for that particular purpose. I think that possibly the line of evidence concerning which your question relates would be competent as it might affect the witness's credibility, but I would like to know what sort of previous offenses, under the common law, are held to affect the witness's credibility. Do you have any authorities on that? Anybody?

Mr. Downs: Let me say this, Your Honor: I will withdraw the question, but I believe you indicated a minute ago that

I could ask him about any similar type of offense. I would like to ask him that question.

The Court: Very good, sir. Objection overruled.

By Mr. Downs:

Q. Davis, in 1950 in Charlotte, North Carolina, were you tried and convicted of an assault on a female with [fol. 199] attempt to commit rape and robbery?

Mr. Bell: Objection.

The Court: What is the basis of your objection?

Mr. Bell: Your Honor, I don't think it has a thing to do with this question before the Court. I think it is incompetent, irrelevant, and it has no bearing upon the ultimate cause of this hearing.

The Court: Well, do you think it has any bearing on the credibility of the witness?

Mr. Bell: No, sir—yes, sir. It has no bearing upon the the cause of this inquiry for the purpose of ascertaining whether this confession was voluntary or involuntary. He is asking him about crimes unconnected altogether with this crime that he is being charged with here.

The Court: Let me ask this question now. I didn't quite understand your answer. Do you think that this question now propounded to this witness has any bearing upon the credibility of the witness?

Mr. Bell: No, sir.

The Court: All right, I will take a ten-minute recess for counsel on both sides to hand me up an authority.

(A ten-minute recess was taken at this time.)

[fol. 200] The Court: Does counsel have any authorities on the question presently before us?

Mr. Downs: Your Honor, I realized when I asked this question that on Page 132 of the transcript Davis was asked these questions in the Superior Court of Mecklenburg County regarding all of the record of which I have asked him a part. I asked him the specific question regarding this one offense of assault and robbery, contending that they were infamous crimes. And if I were permitted to follow it, I would attempt to examine him as to whether or not he knew this particular crime was committed within about a

block or block and a half of the alleged crime against Mrs. Cooper, in the same cemetery, but at the opposite end of it. That was my line of questioning. Now, it is already in the record, Your Honor. As I understand, the transcript is a part of the record. So that was my line of questioning. We do not press the point. But that is the reason I was asking him.

The Court: You are now saying, if I understand it, that these questions and his answers to these questions are contained in the record that is before us?

Mr. Downs: No, sir. The question I asked him is in the record. My idea was to follow it up and enlarge on this record by establishing or trying to establish the fact that the 17 to 25 years that is indicated in this record—that the [fol. 201] offense for which he was convicted there was actually committed within the general vicinity of the one for which he was tried in 1959. And it is a similar type of offense.

The Court: Well, now, doesn't that type of evidence, in effect, go to the question of guilt or innocence? What would be the purpose of considering that, of connecting geographically, so to speak, the locale of the two offenses? What would be the purpose of that?

Mr. Downs: Well, sir, after looking at the law here, apparently similar offenses, unless they are connected, cannot be asked: "Generally on the trial of an accused person prosecution will not introduce evidence of another offense holding the defendant is the one charged. But there are many exceptions to the rule." Then they go on to say in these different cases that if there is some connection; and if there is any connection, we want to show it. If there isn't any connection, then of course we would not want to.

The Court: But would that go to any issue other than that of guilt or innocence?

Mr. Downs: Well, of course, he denies he was even in the general vicinity on this day in question; and we would want to show anything—That would go to his credibility, I [fol. 202] assume.

The Court: Well, I think this may be a pertinent place to observe that I have heretofore in this hearing permitted the Petitioner to testify, upon direct-examination by his counsel, that he is innocent of the crime of the murder of

Mrs. Cooper. I am of the opinion, however, that relevant decisions of the United States Supreme Court hold that the voluntary nature of the confession must be determined with complete disregard of whether or not the petitioner, in fact, spoke the truth in the alleged confession. Now, if the issue before this Court in this hearing upon the mandate of the Court of Appeals is the voluntary nature of the confession, then it would have no relation to the question of the Petitioner's guilt or innocence of the crime with which he is charged, any any evidence bearing upon his guilt or innocence, therefore, would seem to be irrelevant.

Do you wish to pursue now your question as to the matter? If so, I am prepared to rule on it.

Mr. Downs: No, sir. I believe we will rely upon the record and ask the witness to come down.

The Court: All right. You have no further cross-examination?

Mr. Downs: No, sir.

[fol. 203] The Court: Anything further on direct-examination?

Mr. Bell: No, sir. Your Honor, that is the case for the Petitioner.

The Court: Is there any evidence for the Respondent?

Mr. Downs: Yes, sir?

Harold Fesperman, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. State your name.

A. Harold Fesperman.

Q. Mr. Fesperman, by whom were you employed on September the 21st, 1959, and prior thereto?

A. The City of Charlotte Police Department.

Q. Were you assigned to the Detective Division?

A. Yes, sir.

Q. State whether or not, as a member of the Detective

Division, you were assigned to investigate the death of one, Mrs. Foy Bell Cooper.

A. I was.

Q. Did you see Elmer Davis, Jr., the Petitioner in this [fol. 204] matter, on or about the 21st of September, 1959, or thereafter?

A. Yes, sir.

Q. And did you determine from Elmer Davis or from other people that he had a sister by the name of Eloise Sadler living in the City of Charlotte?

A. Yes, sir.

Q. And as a result of that, state whether or not you went to see Eloise Sadler.

A. I did.

Q. Is that the same person who testified here in this Court yesterday under the name of Eloise Stowe?

A. Yes, sir.

Q. And did you go to see Eloise Sadler, now known as Stowe, while you were on duty, Mr. Fesperman?

A. No, sir. (Not while on duty.)

Q. Do you recall how many days after September 21st, 1959, you went to see her?

A. It was approximately three or four days.

Q. Did you inform her that Elmer Davis was in the custody of the City Police Department?

A. Yes, sir.

Q. And what statement, if any, did she make to you regarding that?

A. She told me that she hadn't seen Elmer in approxi- [fol. 205] mately eleven years and that she didn't know whether she could get off to go up there to see him, that she was working and that she had some children there.

Q. Did she tell you definitely whether or not she was intending to go to see him?

A. No. She told me that she didn't know when she would get up there.

Q. Now, Mr. Fesperman, did you interrogate the defendant, Elmer Davis, Jr., from time to time?

A. Yes, sir.

Q. Did any of your interrogations ever take place during the hours after dark?

A. No, sir.

Q. Did you ever threaten Elmer Davis in any way?

A. No, sir.

Q. Did you ever hit him with your hands, fists, or any other object?

A. No, sir.

Q. State whether or not you were present immediately outside of the interrogation room when Lieutenant Coy Sykes went in the room alone with Elmer Davis.

Mr. Bell: Your Honor, we object to the leading.

The Court: Well, he wants to direct his attention, as I understand it, to a particular time and place. I don't know how he is going to do that without leading to that extent. [fol. 206] Objection Overruled.

A. Yes, sir.

Q. And could you hear what was said inside the interrogation room?

A. Just in parts.

Q. Do you know why Lieutenant Coy Sykes went in the room at the time in question?

Mr. Bell: We object to that.

The Court: Well, now, if he knows, Objection Overruled. Of your own knowledge.

The Witness: Yes, sir.

Q. Why did he go in?

A. Because I asked him to.

Q. During your interrogation of Elmer Davis and the entire time that you saw him between the 21st of September, 1959, and October 6, 1959, until the time Lieutenant Coy Sykes went in the room, had you ever mentioned to Elmer Davis the murder of anybody?

A. No, sir.

Q. Had you mentioned to Elmer Davis about a white woman?

A. No, sir.

Q. Do you know whether or not after Lieutenant Sykes went in the room to see Elmer Davis that you went anywhere with Elmer Davis?

A. Yes, sir.

[fol. 207] Q. Where did you go?

A. Went to the Pinewood Cemetery, Elmwood and Pinewood combined.

Q. Why did you go out there, Mr. Fesperman?

A. Elmer Davis was going to re-enact the murder that he committed on the 20th of September, 1959.

Q. I'll ask you now did he re-enact the alleged crime?

A. Yes, sir.

Q. Did you officers direct him and show him in any way what to do?

A. No, sir.

Q. During the time of your investigation between the 21st of September, 1959, and October 6, 1959, had you seen Petitioner's Exhibit No. 1?

A. No, sir.

Q. Were you aware that the information contained on the center part of Petitioner's Exhibit was on there?

A. No, sir.

Q. And why did you go out to see Elmer Davis's sister, Eloise Sadler, now known as Stowe?

A. Because he asked me to. I asked him rather did he have anyone he wanted to call or get in contact with. He told me he had a sister and that she lived off of West Boulevard, the name of some settlement out there—I don't know the name of the settlement—I can't think of it right [fol. 208] now. I was on my way home. I told him I would go out there after I got off duty and stop by and tell her.

Q. Did you ever go back on any other occasion?

A. Yes, sir.

Q. Mr. Fesperman, were you the first person to go out to see Eloise Sadler?

A. Yes, sir.

Q. Did you say whether or not you went back to see her on another occasion?

A. I went back.

Q. Did you go alone at this time?

A. No, sir.

Q. Who went with you?

A. Detective Hucks and Detective Gardner.

Q. And what did you talk to Eloise Sadler about on that occasion?

A. We went out and asked her when she was going to go up and see her brother, and we also asked her about whether

she had had any clothes taken from her house like pants, shirts, shoes, and one thing and another, and she said she did not.

Q. Well, did she ever answer the question about when she was going up to see her brother?

A. She said she didn't know, because she had so many kids there that she had to look after and had to get somebody to stay there with them.

[fol. 209] Q. Well, so far as you know, Mr. Fesperman, during the period of September 21, 1959, to October 6, 1959, Eloise Sadler, now know as Stowe, never came up there to see Elmer Davis; is that right?

A. That's right.

Mr. Downs: You may examine him.

Cross-examination.

By Mr. Nivens:

Q. Mr. Fesperman, how many members of the Detective Department of the City of Charlotte are employed; how many detectives do you have?

A. Well, I expect there's twenty-some detectives; I don't know exactly how many.

Q. How many did you have at the time when Elmer Davis was apprehended?

A. Still about that many.

Q. You have between twenty-five and thirty, don't you?

A. Approximately something like that, I imagine.

Q. And every one of these detectives was assigned to the solution of this case; isn't that right?

A. No, it isn't.

Q. Well, now, how many were assigned to it?

A. Just Detective Hucks and myself were assigned, and we were supposed to get Mr. Homer Gardner, Detective [fol. 210] Gardner, to help us.

Q. And those were the only persons who were in charge of the solution of this case, about four or five officers; is that what you are saying?

A. We was in charge of the investigation of the case, yes.

Q. Well, did anybody else participate in it?

A. When we asked them to.

Q. Well, who were the ones that you asked?

A. We asked Detective Porter and Holmberg to talk to him.

Q. All right, then, that was about six, wasn't it?

A. Five.

Q. Five officers?

A. The Captain and myself and Mr. Hucks and Mr. Porter and Mr. Holmberg and Mr. Gardner are five so far.

Q. All right. Now, are you telling this Court that from the time you apprehended Elmer Davis on the 21st of September, 1959, up until October the 6th or October the 7th, 1959, that nobody interrogated Elmer Davis in regards to this case?

A. I would tell him that no one interrogated Elmer Davis with regards to this case except the ones assigned to my knowledge, Detective Porter and myself and Detective Hucks and Holmberg and Detective Gardner, until the last day, and I asked Lieutenant Sykes to come in there.

[fol. 211] Q. Now, but I am asking you this: To your knowledge nothing was mentioned about the murder of Mrs. Foy Bell Cooper until Elmer Davis confessed on October the 6th?

A. That's right.

Q. Of the five or six of you who were assigned to this case, who was put in charge? Was any particular person made the head of this investigation?

A. There was no five or six assigned to the case. There was two of us assigned to it, Detective Hucks and myself, and Mr. Gardner was going to help us. Captain McCall is in charge of the whole Detective Division; he knows what is going on up there, and Lieutenant Gilleland was our lieutenant.

Q. So Lieutenant Gilleland was in charge?

A. He was in charge of our shift, yes, sir.

Q. Now, did all of these men that you just mentioned, these four or five, who were directly responsible for this investigation, were all of them on the same shift?

A. No, sir.

Q. Now, I believe that you went with the two or three officers who went over to Gaston County is pick up Elmer Davis, didn't you?

A. No, sir.

Q. You did not. Well, now, what men went over there, if you know?

[fol. 212] A. Detective Holmberg and Porter and Lieutenant Gilleland, I believe, went over there.

Q. Now, you testified that you went to see Mrs. Stowe by yourself the first time?

A. That's right.

Q. And she lives out in the vicinity in which you live or somewhere near there?

A. That's right.

Q. And you told her that her brother wanted to see her?

A. That's right.

Q. Did you tell her what they had him for?

A. Yes, sir.

Q. Well, what did you tell her?

A. When I first went in there, she was in the house.

Q. Now, just answer my question.

A. Okay. I told her that he was picked up in Belmont for being an escapee from the State Prison, and I also told her that he was held for investigation in a murder case that we had.

Q. Well, did you tell her what the murder case was about?

A. Yes, sir.

Q. You told her that Mrs. Foy Bell Cooper had been murdered and that he was the prime suspect?

A. I didn't mention any names. I asked her if she had heard about where a woman was killed in the cemetery. She [fol. 213] said, "Yes." I said, "Well, he is being held as a suspect in that case."

Q. So this was the first trip that you made. All right, then, you went back again?

A. That's right.

Q. Well, how long after the first time that you went was it that you went again?

A. I'd say around two days.

Q. You went back within two days after the first trip?

A. That's right, to tell her again that——

Q. Well, had Elmer told you? When you went on this second trip, had he told you again that he wanted to see his sister?

A. No.

Q. Well, why did you go back the second time?

A. We went back to ask her if she had missed any clothes from her home, shoes, shirts, or pants, or anything, and she said, "No."

Q. And at that time did you not ask her about her half brother?

A. No, I didn't know anything about a half brother.

Q. Do you know whether or not Elmer was her whole or half brother?

A. He told me it was his sister. I knew Elmer had a stepmother as I talked to him about it and he told me.

[fol. 214] Q. Elmer Davis very shortly after he was picked up and brought to Mecklenburg County did ask to see his relatives and friends?

A. That's right.

Q. Now, do you recall—I believe you testified that you were present when Elmer Davis was interrogated?

A. On what occasion?

Q. On one occasion.

A. On what occasion?

Q. When was that?

A. I asked you: what occasion when he was interrogated? He was interrogated once or twice every day by Detective Porter—I mean Hucks and myself. Now, what occasion are you talking about?

Q. Now, you mean to say once or twice every day for the sixteen days that he was held in prison he was interrogated by you and some other officer?

A. About once and sometimes twice Detective Hucks and Gardner, we'd get him out and talk to him, but it was always in the presence of one of us in there.

Q. Now, when you would get him out, where would you carry him to?

A. I carried him right outside the door in the office adjoining the Detective Division. The jail adjoins the Detective Division almost.

[fol. 215] Q. Now, where was he detained at first when you first incarcerated him?

A. You mean after he was brought to the city jail?

Q. Yes.

A. He was taken on the second floor.

Q. All right, did he stay there for the entire sixteen days?

A. To my knowledge he stayed right there on that second floor.

Q. Stayed right there on the second floor?

A. That's right.

Q. And every time you interrogated him, you brought him out and brought him into the Detective Division?

A. On the same floor, that's right.

Q. Now, was Captain McCall ever there when you interrogated him?

A. No, not every time.

Q. Well, now, how many times was Captain McCall there?

A. Well, I couldn't say that. He was in and out of the office all the time; he could have been there and I didn't see him, but he never was in the room with us when we interrogated him.

Q. Do you know about how many times Captain McCall participated in the interrogation?

A. To my knowledge he didn't participate a time in the [fol. 216] interrogation.

Q. Well, did he listen to what you all said?

A. He certainly did not.

Q. In other words, you are saying so far as you know Captain McCall was never present during the time the officers were interrogating Elmer Davis?

A. During the time that Detective Hucks and myself and Detective Gardner interrogated him, Captain McCall was not present.

Q. Now, tell me this: What did you ask Elmer Davis about during the time you were interrogating him?

A. Well, when I first got him and talked to him, I asked him about his family, because I had been out on a case before where his mother killed his father. I went out there once before and picked up his father for violation of probation. And I also talked to him about the treatment he had while he was at the State Prison Camp, about the food he had to eat, and he told me about the food they gave him and things he likes; he said that he likes peanuts and that he got steak, potatoes, and rice, and beans; he said he was treated well.

Q. All right, and that was just the extent of your conversation throughout the whole sixteen days?

A. No.

[fol. 217] Q. Well, why did you discuss food with him?

A. Well, just some conversation to start talking to him.

Q. Well, now, did you not realize that Elmer Davis wasn't getting anything but two sandwiches a day?

A. I knew what he was getting.

Q. What was he getting?

A. Four sandwiches a day.

Q. Well, why did you discuss food with him?

A. Well, that was one of the first days out, and I was just talking to him. I just came up, and he was talking about his treatment and also talked about how he made his escape from Haywood County.

Q. Well, now, let me ask you if Elmer Davis did not tell you that he was hungry the first time you talked to him about this situation?

A. He did not.

Q. He did not?

A. He did not.

Q. Well, did he ever tell you that he liked peanuts?

A. Yes.

Q. Did he ever ask you to bring him some?

A. He never did ask me to bring him any peanuts.

Q. Well, did he ask you for a steak?

A. No.

Q. So the extent of your conversation with Elmer Davis [fol. 218] was food?

A. No.

Q. And a few more items with regards to his family difficulties?

A. No.

Q. Well, what did you want to discuss Elmer Davis's father's death with him for?

A. Well, I talked to him and really discussed it just to let him know that I knew his family. They lived on Chisholm Court.

Q. Well, that had nothing to do with this investigation, did it?

A. No.

Q. Well, now, when you went there to take him out of the cell, you didn't go there to just—that wasn't your main purpose, to hold a conversation with him, was it?

A. No.

Q. And it was your intent to get from him a confession of this crime, was it not?

A. No.

Q. Well, how did you intend to work out the solution to this problem? How did you intend to work out this case?

Mr. Downs: Objection.

The Court: Overruled.

A. After he told us about his escape and what he had done [fol. 219] with his clothes, we checked out every clue; and he told us about how he walked the tracks from the camp to Asheville, and where he broke into a home up there in North Asheville and stole a pair of shoes and some ladies' undergarments out of a house and, when he came out of the house, he took some clothes off of the line; and he put these shoes and the clothes on; he threw them in the bushes; and how, when he got to Asheville—he told me him and another boy left, and the other boy stole a truck, but he would not take the truck; and he caught a train to Hickory, and he caught the bus from Hickory to Charlotte.

Q. Now, what did you do as a result of the information you got from Elmer Davis as to where he was on these various occasions?

A. We followed out his clues to see if he was true.

Q. Did you find out whether he was true or not?

A. I did.

Q. You did?

A. I found out the results of our investigation.

Q. And you found out that he was not true, did you not?

A. That's right.

Q. Then as a result of finding out that he had not been to these various places, what did you do?

A. Well, we just had to keep going and investigate further.

[fol. 220] Q. All right. But did you ever tell Elmer Davis that he was not at this particular place at this particular time?

A. Yes.

Q. And for what period of time did you tell him that?

A. Well, during our whole investigation; it was from the time we got him up until just about the 6th of October, the whole time the investigation was on, although we didn't just

spend all of our time talking to Elmer Davis. We had other people that was in the cemetery at the time, and the boys that was in the cemetery chasing chipmunks and things.

Q. I'm not asking you about these boys that were in the cemetery. We are talking about this confession now. I'm asking you did you not, after breaking down each alibi, did you not come back to the prison cell in which Elmer Davis was kept and tell him that he was not at these particular places at the various times that he gave you?

A. No.

Q. You did not tell him that; you never did do that?

A. I told him, but I never did go to his cell. I never did go to his cell; I never did see Elmer Davis in his cell.

Q. Well, how did you tell him?

A. Because we asked the jailer to bring him out to the jail door, to the entrance of the jail, and we would take him from there to the interrogation room and tell him.

Q. All right, you'd take him to the interrogation room [fol. 221] and tell him that you had found out that he wasn't at these particular places at the time he said?

A. Well, he was with me on some of the occasions we went.

Q. All right, then, you took him around to some of these places before he confessed, didn't you?

A. That's right.

Q. And where did you take him?

A. We took him to Canton, North Carolina.

Q. Where?

A. To the City of Canton; went to the outskirts; and he said he would show me the house that he broke into and the place he got the clothes and the shoes and where he threw the clothes and shoes. I put handcuffs on him, took the shackles off his legs; put one cuff on his right hand and the left one on mine—I mean the other cuff on my left hand; and we started up the railroad tracks from the outskirts of Canton and walked to the outskirts of Asheville, North Carolina, on the tracks; and he was going to show me where the house was. He said you could see it from the railroad tracks, the house that he went into.

Q. All right, now, how many miles was that?

A. Well, approximately, from Asheville Canton is nineteen miles.

Q. So you walked Elmer Davis; you walked along with him nineteen miles from Canton to Asheville?

[fol. 222] A. From the outskirts of the city, I imagine it would be about fourteen miles, something like that.

Q. About fourteen miles?

A. Thirteen or fourteen. I walked it.

Q. Now, Mr. Fesperman, let me ask you this: You did not testify in the Superior Court on this case, did you?

A. I did not.

Q. Do you know why you didn't testify then?

A. Yes, I do.

Q. Why?

A. I was in the hospital.

Q. You were in the hospital?

A. In the Mercy Hospital.

Q. Now, Elmer Davis told you that he was between Canton and Asheville?

A. He walked the tracks from Canton to Asheville.

Q. I'm not talking about that. He told you that, and then you went to re-enact or you went back to check with Elmer Davis on the validity of the statement that had been made to you?

A. That's right.

Q. All right, what else did he tell you, where else did he tell you he had been?

A. Well, that's the only place. He said after he got off at Charlotte, he was going to go to Belmont. I asked him [fol. 223] how he got to Belmont, North Carolina. He said he caught the P&N train right there at Cedar Street and rode the P&N train to Belmont where he jumped off, and I told him that the P&N train had not run in several years, that they had disbanded the P&N train from Charlotte to Gastonia; that he did not ride the P&N train to there, passenger train.

Q. So then you told him that he was telling a lie about that situation, didn't you?

A. I told him he was telling a lie about riding the P&N train which wasn't running at that time.

Q. Well, now, how long was this after you had walked him these nineteen miles from Canton to Asheville?

A. Well, I don't remember whether that was after or before. But we was asking him about his trip from the

escape, from the time he came. That might have been before we went to Asheville about this—I mean that was before we went to Canton that I told him that, because he told us about how he got there and where he had went, that he went on over to Belmont; and then I told him that the train was not running there any more because it had stopped.

Q. Now, all of this was before he had confessed.

A. Yes.

Q. Now, you said that you took the shackles off his legs?

A. Yes.

Q. And handcuffed him to your arm?

[fol. 224] A. That's right.

Q. And what time did you start out on this twenty-mile trip?

Mr. Downs: Your Honor, we at this point would like to Object. I think it is germane that this man interrogated the prisoner and for how long, but specifically what he interrogated him about, unless it shows some pressure or threat to this fellow, I don't know that it has any relevancy at all where this detective talked to him.

The Court: Well, he has the witness on cross-examination. Objection Overruled.

A. We started out from Canton shortly after dinner.

Q. That is, shortly after 12:00 o'clock?

A. Yes, something like that.

Q. Now, if you recall, what had Elmer Davis had to eat on this particular day? How many sandwiches did he have to eat?

A. He had a meal. He did not have any sandwiches. The Chief of Police at Canton said they——

Mr. Bell: I Object to what the Chief of Police said.

A. I cannot say what he had to eat, but they brought him a hot meal over there to him.

Q. I object to that unless you saw it.

[fol. 225] A. I didn't see it.

Q. Well, what did you see him eat that day?

A. That day?

Q. Yes.

A. I saw him eat some peanuts and drink a soft drink on the way up there.

Q. He ate some peanuts and a soft drink on the way to Canton?

A. That's right.

Q. So far as you know when he left the city jail, he only had these two sandwiches that are provided for the prisoners?

A. No, sir, he didn't have any sandwiches that morning when we left. We left early that morning; we left at approximately 5:00 o'clock in the morning and went by Detective Huck's home where he had a nice breakfast, and then we left out and went on up the line; and around Chimney Rock somewhere we stopped and got a soft drink, and he got some peanuts, and we went on into Canton and stayed up there a while, and they said they would feed him.

Q. Now, when you broke down these alibies and you came back and told Elmer Davis that he was lying, did you ever curse him?

A. I didn't wait until I came back to tell him; I told him while we was walking along the railroad track. He could [fol. 226] remember places that he passed like a little small road crossing the railroad track and a gap there, and I said, "Do you remember passing this place?" He said, "Yes." But on up the line there, though, there is a big rubber plant or something, a lot of water and lights burning there all the time, but he said he did not remember passing that place. And after going on up the line, I said, Can you see the house from the railroad that you went into?" He says, "I can see it where I went into." But we never did see it.

Q. Well, you had your pistol with you?

A. Yes.

Q. And you told him that he was telling a lie?

A. At the end of the walk I did, yes.

Q. You told him he was telling a lie. And you cursed him?

A. I did not curse him.

Q. Did you ever use any profanity in his presence?

A. I never did curse the boy.

Q. I asked you if you ever used any profanity in his presence?

A. I did not.

Q. Well, what about the other officers that went along with you on this trip?

A. No one went along with me but Detective Hucks.

[fol. 227] Q. He didn't walk the twenty miles, did he?

A. I didn't walk the twenty miles either.

Q. Well, you are not saying that Elmer Davis walked it by himself?

A. We walked approximately thirteen or fourteen miles.

Q. Well, you walked him approximately thirteen or fourteen miles?

A. That's right.

Q. Officer, how long did it take you to go these thirteen or fourteen miles?

A. Well, it didn't take very long, I tell you that right now.

Q. Because you were pushing him pretty fast, weren't you?

A. No. Because we were mostly in a valley. The banks was on each side of the tracks.

Q. Well, what did you do—did you pull him or push him?

A. We walked along beside one another on the tracks. He wasn't pulled and he wasn't pushed. I was doing pretty good myself to keep up with him.

Q. Well, you knew that he hadn't been fed as well as you had been fed, didn't you?

A. That day I imagine he had.

Q. Well, what did you have to eat that day; do you remember?

A. Well, for breakfast I had a bowl of cereal and two [fol. 228] cups of coffee. And up in Canton, well, I tell you I don't know what I had on the menu; it wasn't too much, because I had to pay for it myself. I don't think I spent over sixty cents.

Q. Well, you are generally fed pretty well? You get more than two sandwiches a day, don't you?

A. Yes. He got more than two sandwiches a day also; he got four.

Q. Well, now, these were dry sandwiches, weren't they?

A. Yes, sir.

Q. Something like the——

A. ——Dinner Bell. They were wrapped sandwiches.

Q. At the most they only had some bologna between them, isn't that right?

A. No they were different kinds. They've got chicken salad and ham.

Q. Well, ham salad?

A. No, there's a piece of meat in them.

Q. Very thin, though, isn't it?

A. Well, I haven't seen any sandwiches yet you buy uptown that wasn't thin.

Q. Well,i t was a fifteen-cent sandwich?

A. No. Some were fifteen, twenty, and twenty-five, because I have eaten them myself.

Q. Well, these sandwiches were all in the same bracket, [fol. 229] weren't they?

A. Fifteen, twenty, and twenty-five cents.

Q. Well, now, what did you give him to drink that day?

A. Well, he had his opportunity to get what he wanted. He had a chance to get a Coca-Cola, anything besides a beer.

Q. Well, did you see him drink anything?

A. Yes, I saw him drink a soda pop.

Q. Soda pop?

A. Yes, Coca-Cola or orange or something; I don't know exactly what he had. I had a Coca-Cola myself.

Q. Well, how many times did he complain about being hungry on this trip?

A. He never did complain about being hungry.

Q. Well, how many times did he complain about being hungry over the sixteen-day period?

A. He never did complain about being hungry the whole time he was in the city jail, not to us he didn't.

Q. Not to you.

A. Or my partner, Mr. Hucks.

Q. Well, you weren't with your partners all the time, were you?

A. I was with Mr. Hucks every time the boy was interrogated or he was with me.

Q. Well, you said that all of you weren't on the same shift, didn't you?

[fol. 230] A. Detective Hucks, I said, was with me. Detective Hucks and myself were partners; we worked the same shift. Detective Porter and Holmberg worked the afternoon shift.

Q. Well, now, you don't know whether Detective Porter and Detective Holmberg interrogated this boy or not, do you?

A. Well, yes, I do.

Q. You do know that they did interrogate him?

A. Yes, because we asked them to.

Q. Well, now, did you ever see them interrogate him?

A. No.

Q. Well, how many times did you direct them to interrogate him?

A. Once.

Q. Once a day?

A. No, just one time. We asked them would they talk to him, and they said they would.

Q. Talk to him about what?

A. Well, about his background, his life.

Q. In breaking down these alibis.

A. Yes.

Q. Well, you knew about his background, didn't you?

A. Yes. But I didn't know all about his boyhood. I told them to talk to him about that.

Q. Well, what did you want to know about that for?

A. Well, when people are charged with serious crimes, I [fol. 231] just want to know a little about their background and one thing and another.

Q. Well, this man wasn't charged with anything, was he?

A. No, he wasn't. But he was under investigation, and I wanted to know something about his background. On everyone we pick up, regardless of——

Q. Well, you didn't tell him what he was being investigated for, did you?

A. No.

Q. And nobody else told him for the first sixteen days, did they?

A. That's right.

Q. Now, let me ask you again; I have forgotten. Did you go to Belmont after him?

A. I did not.

Mr. Bell: All right, that is all.

Coy L. Sykes, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. Your name, please, sir?

A. Coy L. Sykes.

Q. Mr. Sykes, by whom were you employed on the 21st of [fol. 232] September, 1959, and theretofore?

A. The City of Charlotte Police Department.

Q. Are you now so employed?

A. Yes, sir.

Q. On the 6th day of October, 1959, state whether or not you had occasion to go up to the Detective Bureau there in the City Police Department.

A. Yes, sir.

Q. Did you see at that time Elmer Davis?

A. Yes, sir.

Q. State whether or not he made any request of you, Mr. Sykes.

A. During a conversation, yes, sir.

Q. Just tell us when you first saw Elmer Davis exactly what was said by him and what was said by you, the best that you can recall.

A. When I arrived at the Police Department Detective Bureau, he was in the room with Detectives Hucks and Fesperman.

Q. Now, sir, will you call the defendant by name.

A. Elmer Davis was in a room with Mr. Hucks and Mr. Fesperman of the Detective Bureau when I walked in. I was not familiar with this case as I had been out of town and had just come back the day before, and I came back to work on the 6th of October. I asked them if it would be all [fol. 233] right if I would sit in there and learn something about the case. They said it was. So I spoke to Elmer and told him who I was and why I would like to be present. At the same time I mentioned to Elmer—because I knew nothing of what had been told to him or about any conversation with he or Davis or anybody; I knew nothing of no conversation—I said, "Elmer, I guess you know that you are being held for something other than an escapee, don't you?"

He said, "Yes, sir." I said, "well, would you like to talk to all three of us, or would you like to talk to two of us, or would you like to talk to one of us by ourselves?" He said, "I would like to talk with you." I said "All right."

I asked Mr. Hucks and Mr. Fesperman would they leave the room, and they did. After they left, I noticed he had a small Testament in his hand that he was going through. He was not reading it, but he had it in his hand turning some pages. I said, "Elmer, have you been reading the Scriptures?" He said, "I have." I said, "Since you have been here," I said, "have you also talked with your Almighty?" He said, "I have not"; he says, "I do not know how to pray."

And in the conversation there we went back to his background some, to his home life. I asked Elmer if he would like for me to pray. He said, "I do not know how"; and says, "I wish you would pray for me." I did so. And [fol. 234] after the prayer, we possibly sit there something like maybe a minute; could have been a little more or maybe a little less. Neither one of us spoke. He was sitting across the desk from me. Elmer says. "I'd like to tell you something." I said, "All right." He said, "I killed that woman." I said, "What woman, Elmer?" He said, "The woman in the cemetery." I said, "Do you want to tell me about it?" He said, "Yes, sir."

He went ahead and related to me how he had gone to the cemetery. He told me how she was sitting on the bench; that he came up behind her and grabbed her and related how he carried her on beyond a large tombstone, and that he laid her on the ground, and that he believed in his opinion that her head had hit the corner of the tombstone; and that at that time he had unnatural relations with her; and that he picked her body up and carried her through a large hole that was in a fence that separated two sections of the cemetery and carried her to a building and put her through a hole that was in the building and placed her on the floor inside; and that he left, and that she was bleeding when he left, but at the time he thought that she was still living.

I asked Elmer at that time, I said, "Elmer, would you go with Mr. Hucks, Mr. Fesperman, and myself, or with either one of the three that you choose, go back to the cemetery and show us, if you want all three of us to go, just

[fol. 235] exactly what taken place?" He agreed to do that. I got up from the desk, and I went to the door and called Mr. Hucks and Mr. Fesperman in there and told them that Elmer had agreed to take us to the cemetery and show us where he entered the cemetery and show us all that he could about what taken place at the cemetery.

We then placed him in a car and proceeded and did go to the Elmwood Cemetery. We entered, I believe—I don't know what entrance right at the present time we did enter. It has several. Possibly the Sixth Street entrance of the cemetery. We proceeded under Elmer's directions to a spot in the cemetery. He informed us that that would be about as close as we could get in a car. We stopped the car under his direction, and he led us to a spot in the cemetery. He showed us a fence that he crossed over. The fence at that time had some shrubbery close to it and some small trees with limbs. He told us how he came over this fence. He showed us a cement bench that a lady was sitting on. He said she was an elderly lady and said, "Her back was to me"; that she was reading a newspaper, and that he crept up behind her and grabbed her. And from the bench, with him leading us, he went possibly twenty-five or thirty feet—could be a little more or a little less—away and showed us a large tombstone. This tombstone possibly sat about four to five feet high and possibly three feet wide; and [fol. 236] on the opposite side of that he told us that's where he dropped her on the ground, and that in his opinion her head struck the corner of this monument. He showed us in the position that her body was laying. He, himself, got on the ground and showed us after "ripping or tearing," as he described it, a portion of her pants, he showed us the position that he placed his own self on the ground; and at that time the unnatural act taken place.

He then led us to a large hole in the fence. I think this fence possibly stood about six feet high. The hole was in the center, and it was a good, large hole, and at the top of the fence there was barbed wire. He showed us how he went through the hole. And, if I am not mistaken, I believe that we entered through that hole ourselves. And he carried us to a little house that is called a mausoleum and told us that that is where he placed the body.

After leaving there, he carried us to a piece of shrubbery

that was a good distance, not too far—it was still in the cemetery—where he had thrown, I believe, her pocketbook. I won't be positive about that, but it was either a pocketbook or some effects that belonged to her.

There may be one other thing or maybe two things that transpired there in the cemetery, but I do not remember. But from the cemetery we brought him back to the Detective Bureau. I then related what had happened to Captain [fol. 237] McCall; and from there out, of course, what taken place and so forth was under his directions.

Q. Lieutenant Sykes, did you threaten to fram hell out of this man while you had him there in the room talking to him?

A. At no time have I ever threatened Elmer Davis.

Q. At the time you were talking with Elmer Davis there in the room on the day in question when he did confess to you, did you threaten to kill him?

A. No, sir.

Q. At the time you had Elmer Davis there in the room the day he confessed to you, did you call him an s.o.b.?

A. No, sir.

Q. Did you hit him or slap him or use any object of force against his body?

A. At no time.

Q. Without revealing the contents of the prayer, Lieutenant Sykes, did this prayer, or was it your intention by prayer to coerce him to do anything?

Mr. Nivens: Objection.

The Court: Now, that calls for a conclusion of the witness as to his intent. I think it's more a question of what effect, if any, what was said would be expected to have upon the particular Petitioner in this case. Without going into [fol. 238] what was actually said, I think his conclusion might be objectionable as invading the province of the trier of the facts. Objection Sustained.

By Mr. Downs:

Q. Lieutenant Sykes, when you went into the room to talk with Elmer Davis, did you go in there for the express purpose of praying with him?

A. No, sir.

Q. Did the prayer, itself, contain any reference to confession?

Mr. Nivens: We object to that, Your Honor.
The Court: Objection Overruled.

A. It did not.

Mr. Downs: You may examine the witness.

Cross-examination.

By Mr. Bell:

Q. Lieutenant, when you first saw Elmer Davis, did you know how long he had been in jail?
A. I did not.
Q. And you didn't try to find out?
A. I had just come on duty. I had just walked into the Police Department. I was gone at the time of this crime. I had just come back on duty on the 6th.
Q. I asked you did you try to find out how long he had [fol. 239] been in jail.
A. No, sir. At the time I walked in there, I didn't even know he was sitting in the room until I got in it.
Q. You didn't even know what the man was being held for?
A. No, sir.
Q. When did you find out what he was being held for?
A. I had read an account of it. I had not discussed it with anybody in the Police Department.
Q. Well, when did you first discuss it with anybody in the Police Department?
A. I think when I walked into the room with Mr. Hucks and Mr. Fesperman that afternoon. To the best of my knowledge, that is the first time I discussed it.
Q. Well, did they tell you what he was being held for?
A. I don't know whether they did or not.
Q. So you had no information as to what the man was charged with?
A. I think, Mr. Bell, if you will let me explain this——
Q. I want you to answer my question.

Mr. Downs: Objection, Your Honor.

Q. You said at the time you had no information as to what he was being held for?

A. Yes, I possibly had some information.

Q. All right. Well, I want to know who told you about it.

A. Now, that, I could not say, because in a discussion——

[fol. 240] Q. Well, you remember this prayer; you remember seeing him; you remember everything else about it. You can't tell the Court who told you about it?

A. Well, in telling me directly, I don't think anyone told me.

Q. Well, how did you find out?

A. I have been trying to explain as to how I found out.

Q. Well, how did you find out?

A. Well, in the discussion around the Police Department when I came in that afternoon. Now, this is before I came into the Detective Bureau. In the discussion around, in the conversation that goes on around the Police Department with different ones, there was something mentioned about a man being held in connection with this case, in connection with the murder case.

Q. So some policeman did tell you about it?

A. In general conversation, but not directly.

Q. Well, you were talking with the police, weren't you?

A. Oh, yes.

Q. You weren't talking to laymen on the outside?

A. No.

Q. What did the policemen tell you about it?

A. Well, just in general conversation. There was no direct wording to me.

Q. Well, what did they say, Lieutenant?

[fol. 241] A. They said that there was a Davis—E. J. Davis, I believe is the term they used, was being held in connection with this thing.

Q. What else?

A. That was about all. It was just in passing conversation or what we term——

Q. Did they tell you he had been in jail for an extended period of time?

A. No, sir.

Q. You didn't inquire about that?

A. No, I didn't inquire as to how long he had been there.

Q. So you just got curious when they brought him into the police station and wanted to see him privately; is that it?

A. No. I have not said that I wanted to see him privately.

Q. Well, didn't you just testify that you asked the other men to be excused, you wanted to talk to him privately? Didn't you just testify to that?

A. Only at his suggestion.

Q. Do you mean to say that Elmer Davis, who had never seen you, was with Mr. Fesperman and the other officers, and you were sitting there at your desk, and he walks in and tells you that he wants to see you privately?

A. No, I didn't say that.

Q. Well, what did you say?

[fol. 242] A. I said that Elmer Davis was sitting in the room with Detective Hucks and Fesperman when I walked in.

Q. All right. Is that when he told you he wanted to see you privately?

A. No, sir, I did not say that.

Q. Well, what did you say when you walked in.

A. I said we got into a conversation.

Q. Well, what did you say to him?

A. I don't know as I said anything to Elmer at that time.

Q. You said that you got into a conversation, didn't you.

A. I did.

Q. Well, what did you say to him?

A. My conversation first was with Mr. Hucks and Mr. Fesperman.

Q. What did you say to them?

A. I asked them if I could sit in on their conversation or their interrogation with him so I could possibly learn something about the case.

Q. And at that time you knew nothing about it?

A. Only just what I have said about what I had heard maybe downstairs over in our recreation room.

Q. Did you know that he had been carried off and walked nineteen miles up and down the railroad tracks; did you know that?

A. I sure didn't.

[fol. 243] Q. You didn't know that?

A. No, sir.

Q. Did you know that he had been in jail fifteen or sixteen days?

A. I didn't know how long he had been in jail.

Q. Did you know that he had been held under circumstances that would prohibit his seeing a lawyer or friends or counsel?

Mr. Downs: I object to that.

The Court: Objection Overruled.

Q. Did you know that?

A. I did not know who he had talked with or who he had had a chance to see.

Q. I'll ask you to examine this piece of paper, Petitioner's Exhibit 1. Did you know anything about that Arrest Sheet?

A. I did not.

Q. Did you ever see it before?

A. Not up until some time later probably. I don't know whether it was that day or not. I think maybe the first time I seen that was in Superior Court.

Q. You are head of a section of the detectives in Charlotte, aren't you?

A. One shift, yes, sir.

Q. Are you in with Mr. Fesperman, Mr. Hucks, Mr. [fol. 244] Porter, Mr. Holmberg; are they members of your —or were they members of your immediate staff at that time; were they in your section?

A. I don't think all of them were, no, sir.

Q. Well, which ones were in your section at the time of this investigation?

A. At this particular time, Mr. Bell, I don't think I can say; I don't know. I don't know which ones were on my shift.

Q. Well, you were on duty at the time you came in there, weren't you?

A. No, sir. I was coming on duty. My hour of duty began at 3:00 that afternoon.

Q. Well, what time did you come on duty?

A. I came up there possibly around 12:30 or 1:00 o'clock.

Q. Well, what time did your duty begin?

A. My regular tour of duty began at 3:00.

Q. And you came at 12:00?

A. Sometime around 12:30 or 1:00 o'clock.

Q. Well, why did you come in so early?

A. Mr. Bell, sometimes I go in at 10:00 or 11:00 o'clock.

Q. Well, don't you know that these officers sent for you to come up there?

A. They did not, no, sir.

Q. And you mean to tell this Court that neither one of [fol. 245] these gentlemen who had that man out there when you walked in told you anything about this case?

A. They did not. I had not been in that Police Department for a number of days.

Q. Had you been in the city?

A. I came in the city on the 5th. No, I came in the city, I believe back in the city, on Saturday or Sunday.

Q. Well, what was the date you came back in the city?

A. Possibly on the 4th or the 5th.

Q. Did you come down to the police station on the 4th?

A. I did not.

Q. And so you just came down two or three hours early this particular day?

A. On this particular day I possibly came there maybe a couple of hours early.

Q. Well, did you come down two or three hours early? That's what I want to know.

A. Yes.

Q. Why did you come down early, Lieutenant?

A. Well, it's usually customary that I do. If I go to work at 3:00 o'clock, I don't walk in my office or on my job exactly at that time.

Q. You mean to tell this Court that you are always on the job two or three hours early every day?

A. Not every day, no.

[fol. 246] Q. Most days?

A. Not most days.

Q. Well, what days do you come onto your job early?

A. Some days I'm there thirty minutes early; some days I'm there an hour and a half; some days I'm there two hours.

Q. So just as soon as you saw Elmer Davis, you wanted to pray with him?

A. No.

Q. Well, when did you decide that you wanted to pray with him; that he needed somebody to pray over him?

A. I never did make that decision.

Q. And you say Elmer Davis asked you to pray over him?

A. He asked me to pray. Not "over him."

Q. When Elmer Davis asked you to pray, had you told him you were a preacher?

A. No.

Q. Had you told him that you had any office in the church?

A. No.

Q. You do have an office in the church, don't you?

A. At that time.

Q. You do preach a little bit, don't you?

A. I have held some services, yes.

Q. And you told him that, didn't you?

A. No.

Q. Now, you say that Elmer just asked you to pray with [fol. 247] him, not knowing anything about your connection with the church or what office you hold in the church; is that right?

A. He asked me to pray. Now, I don't know what knowledge he had of me, but he asked me to pray.

Q. Did any other officer tell him in your presence that you were a preacher?

A. No.

Q. Did you hear Mr. Fesperman talk to him in your presence that morning?

A. He may have talked with him about the time that I walked in the room, I don't recall.

Q. I asked you did you hear him say anything to him?

A. Not that morning, no.

Q. Did you hear anybody else say anything to him?

A. I wouldn't say positive, but they could have at the time that I was in the room there for a short time, yes.

Q. So they were sitting in the room waiting for you, and nobody was saying one word to Elmer?

A. They were not waiting for me.

Q. I say they were sitting in the room without any conversation between them going on at the time you walked in?

A. There was no conversation at the moment I walked in, no.

Q. Well, who was in the room?

A. There was Elmer Davis, Mr. Fesperman, and Hucks.
[fol. 248] Q. What room were they in?
A. The room that we classify as the middle room.
Q. Whose office is that?
A. That was the office that the lieutenants used as their office. Of course, it was open to other members of the Detective Bureau and of the Police Department.
Q. That's the office you use, isn't it?
A. On my tour of duty, yes.
Q. That's right. And so these men were sitting in that office, your office, waiting for you, weren't they?
A. No, they weren't waiting for me.
Q. Did they know you were coming in there early?
A. No.
Q. You hadn't called down and notified anybody that you were coming in early?
A. No, I had not.
Q. You entered the office and all three of them were sitting down there, and Elmer says—Elmer asked you to pray?
A. No, not at that time.
Q. Did he know your name?
A. Later I introduced my name to him.
Q. Is that before you prayed?
A. Yes.
Q. Well, what did you tell him?
A. When I sit down, I told him who I was. I told him I [fol. 249] was Lieutenant Sykes with the Detective Bureau. And I believe I may have asked him, I said, "Elmer——"
Q. I don't want you to believe, now. I want you to tell what you did, what you know you did.
A. I told him, I said, "You know that I have not talked with you in this matter; I have not seen you." He said, "That is correct."
Q. Well, what matter are you talking about? You say you didn't know anything about it, didn't you?
A. In "this" matter, or maybe I could have said "any" matter.
Q. In what, now? Repeat that.
A. I said in "this" matter, or I maybe could have said in "any" matter. In other words, what I was trying to do

to Elmer was to show him or let him know that I had not discussed anything with him.

Q. Well, Elmer knew that himself, didn't he?

A. I don't know; I don't know what he knew.

Q. Elmer was sitting right up there looking at you, wasn't he?

A. Oh, yes.

Q. And you wanted him to know that you hadn't talked to him before?

A. That's right.

Q. Didn't you think he had sense enough to realize he [fol. 250] hadn't seen you before?

A. I don't know what he realized.

Q. Well, you say you hadn't talked to him before?

A. That's right.

Q. Well, when did this prayer business start?

A. What do you mean?

Q. When did the prayer start, Lieutenant?

A. Well, in our general discussion with each other.

Q. I asked you when did the prayer start, Lieutenant.

A. After I had talked with him.

Q. Well, what had you talked with him about before the prayer started?

A. I think I had talked with him about some of his background.

Q. What background?

A. When he was a youngster. I had some occasion back years ago to go out to his home on Chisholm Court.

Q. Did you know Elmer Davis before this?

A. Yes.

Q. You did know him?

A. Yes.

Q. In what way did you know him?

A. Back when Elmer was a youngster, we had gone to his home. I say "we." I, along maybe with other officers, interrogated him. I think possibly I arrested him one time [fol. 251] on a charge; I don't recall the charge.

Q. I want you to know about it; we're not talking about a possibility.

A. I don't know what I arrested him on.

Q. In what way did you know Elmer Davis before, Lieutenant?

A. As a youngster out in that community we had the opportunity to go out and talk with Elmer at his home in connection with maybe with some other offenses.

Q. We don't want "maybe." In connection with what?

A. With some crimes out in that section.

Q. With some crimes that you figured he had committed?

A. Not necessarily had committed, but possibly maybe could give us some information on it, if he was not connected with it.

Q. Well, why did you mention all of this to him?

A. Well, it was a conversation that, I suppose, one thing was a way of getting into a conversation with him.

Q. Were you trying to gain his confidence?

A. No, I don't know as I was trying to gain his——

Q. Well, what connection did all of that stuff you are talking about now have with the death of the late Mrs. Foy Bell Cooper?

Mr. Downs: Objection. That calls for a conclusion.

[fol. 252] Mr. Bell: Your Honor, this is cross-examination.

The Court: Objection Overruled.

A. I don't know as that particular conversation had anything to do with it.

Q. Well, why did you go into all his background and whether he had done, and all of that?

A. I don't know that I had any particular reason as to why I did.

Q. The truth about the matter is, Lieutenant, you came down there two or three hours early, and you went on into his background, and you talked to him, preparing him for this confession; isn't that the truth, Lieutenant?

A. No, sir. No, sir.

Q. You mean to say you went into all of this story with him, talked to him at length, and at that particular time you tell this Court that you had no idea in the world that this man was going to confess?

A. I had no idea. I had no way of knowing.

Q. You were trying to get him to confess, weren't you?

A. No, sir.

Q. Don't you know that these detectives had told you before that they had had this man in jail sixteen days, and

that they had relays of officers interrogating him night and day, and that they had not been able to break this case?

A. No, sir.

[fol. 253] Q. Hadn't they told you that?

A. No, sir. Never.

Q. How long have you been a policeman?

A. I will begin my twenty-eighth year the 25th of this month.

Q. And you mean to tell this Court that you would go in and interrogate a man and pray with him and not find out anything about his background?

A. I didn't go in to interrogate him.

Q. Didn't you just testify on direct-examination that you asked Mr. Fesperman and Mr. Hucks, who were in there, could you be allowed to talk to him?

A. No, sir.

Q. Well, what did you say?

A. I think if you will check back on this, you will find that I asked them if I could sit in on their interrogation.

Q. Well, I say, you just wanted to sit in there?

A. Yes, sir.

Q. What did you want to sit in there for?

A. I wanted to learn something about what was transpiring between them; I wanted to know something about what they were discussing with him; I wanted to know something about anything that he might have been held for.

Q. Well, don't you know all you had to do was to call them aside? These men were working under you, weren't they?

[fol. 254] A. I don't know as they were assigned to my shift, no, sir, not at that time; I don't recall.

Q. Well, you had authority to talk to these men privately?

A. Oh, yes.

Q. Well, don't they keep a record of what is going on in a case?

A. Yes.

Q. You keep a sheet on it, don't you?

A. Yes.

Q. Well, did you read it?

A. No.

Q. Why?

A. I had not been there long enough to read anything.

Q. Well, let's get down to, let's get back to—When did you decide to pray?

A. When he asked me.

Q. When did he ask you?

A. In our conversation. I suppose altogether I had maybe been in the room with him maybe from five to ten minutes.

Q. At the time he asked you to pray, he hadn't confessed to anything?

A. No.

Q. Officer, had you said anything about religion and Christianity and the church and connected matters with [fol. 255] religion, before you began to pray?

A. Nothing more than the conversation with him about reading his Testament and had he talked with his Almighty. I think that was about the extent of any conversation. I did not talk with him about any connection with any church; I did not talk with him about his religious standpoint or his religious beliefs or his views; none of those were discussed.

Q. Well, why did you want to know whether he had talked with his Almighty?

A. I think that was maybe just in conversation, a follow-up from him reading the Testament. I had no particular reason, I don't think, to maybe ask him that. It was just maybe a question that was a follow-up after asking him if he had been reading his Testament or his Bible.

Q. Exactly what did you say to him? Tell me the exact words you said to him.

A. In noticing him with his Testament, I asked him if he had been reading his Testament; or I could have used the term, Bible. He said he had. I says, "Well, have you also been talking with your Almighty?" He says, "I don't know how to pray. I have not."

Q. What else did you ask him?

A. I possibly could have asked him—I think I did ask him—if he would want me to pray. He said he didn't know [fol. 256] how to pray, and he said he wished I would pray.

Q. You asked him did he want you to pray for him?

A. Yes.

Q. Well, why did you ask him that, Lieutenant?

A. In the conversation back and forth. As I say, I don't know that I had any particular reason.

Q. The truth about the matter, you thought he needed prayer at this time, didn't you, Lieutenant; that's the reason you asked him?

A. No, I won't say that I thought——

Q. Well, why did you ask him if he wanted you to pray for him?

A. I don't know, as I stated before——

Q. Well, you see me every day, don't you?

A. About every day.

Q. Do you ever ask me do I need prayer?

A. No, I have never gotten into a religious conversation with you.

Q. That's right. Why did you want to get into a religious conversation with Elmer Davis?

A. I think with him having the Testament. If he hadn't had the Testament, I doubt if it would have even come around; I don't know that I would have ever discussed any religious matter with him whatsoever.

Q. How long did you pray with him?

[fol. 257] A. I don't know. I don't know as the prayer possibly maybe wasn't over just a matter of a few seconds, maybe fifteen or twenty seconds; I don't know. It was very short.

Q. Did you pray out loud so he could hear you?

A. I did.

Q. What did you say in your prayer?

A. If I am so instructed by the Court to say so, I will. But I would like for it to remain between my God and Elmer Davis and myself.

Mr. Bell: Your Honor, I would like to be heard on that point.

The Court: All right.

Mr. Bell: Your Honor, this is a Court. There have been numerous cases in the Court and have been before the Supreme Court, maybe this Court, on confessions and as to the force and effect of prayer and using religion as a means of obtaining a confession.

The Court: Very well, because of the particular nature of the inquiry before the Court, the witness is instructed

to relate the substance of the prayer to the best of his knowledge and belief.

A. I will not be able to state the exact words that I used, but in my prayer I believe that I stated something like this: O God, You are now a witness to and the watcher over [fol. 258] both of us. I have been asked to pray. I want You to be with me in this prayer. I want You to watch over the person that is present with me; also be with me. I do not only ask prayers for myself, I ask for You to be with all people. And I think that was the extent of my prayer. It may not be word for word, but it was about the extent of my prayer.

Q. So when Elmer Davis asked you to pray for him, you didn't ask God to do anything for him specially?

A. I think I just related that I asked Him, as God, to be with the one that was in the room with me. That was possibly the term that I used. As I say, I don't say that these are the exact words that I said.

Q. Now, you and Elmer Davis were alone at this time?

A. That's right.

Q. And at this time you hadn't said a word to him about Foy Bell Cooper—not a word?

Q. No, no, I had not——

Q. Never mentioned it?

A. No, no, I had never mentioned it to him.

Q. Well, when did you first mention it to him?

A. He mentioned it to me.

Q. I asked you when did you first mention it to him?

A. After he had mentioned it to me.

Q. Well, up until this time he hadn't mentioned anything [fol. 259] to you.

A. Oh, no.

Q. Well, what did you do right after you finished your prayer?

A. We sit there, I guess possibly a minute; neither one of us spoke. He made the first break in any conversation—Elmer Davis.

Q. So after the prayer, Elmer Davis began to talk to you, and you didn't say one word to him?

A. That's right.

Q. Were you sitting in a chair?

A. Yes, sir.

Q. Were you on your knees at the time you were praying?
A. I was sitting in a chair.
Q. At the time you were praying?
A. That's right.
Q. Then Elmer Davis began to talk to you?
A. That's right.
Q. And he began to talk to you about Mrs. Cooper?
A. He didn't mention any names.
Q. I say he began to talk to you about the lady that was murdered?
A. That's right.
Q. And he related to you all the things that you told here previously?
[fol. 260] A. That's true.
Q. And you say he did this alone? Nobody was in there except you and Elmer?
A. That's right.
Q. Officer, I forgot to ask you one question. At the time you were praying did you say anything about forgiveness and repentance?
A. No.
Q. You didn't ask that for him?
A. No, to the best of my knowledge I did not.
Q. You were praying for yourself and him before the confession?
A. And also I think——
Q. Before the confession?
A. I think that he—Repeat that question.
Q. I say you were praying for yourself and Elmer before this confession?
A. And also I asked God to be with all people.
Q. When did you contact Dr. Tross about this thing?
A. I never contacted Dr. Tross.
Q. When did Dr. Tross contact you about it?
A. Dr. Tross never contacted me.
Q. Well, when did you first see Dr. Tross?
A. I believe it was the following morning. Possibly I believe it was on the 7th. When I state "the following [fol. 261] morning," it was on the 7th.
Q. The day after he had confessed to you?
A. That's right.

Q. And you were there in the Detective Division when he walked in?

A. Yes, sir.

Q. What did he say to you?

A. I don't believe he said anything to me. I believe he first talked with Captain McCall, as I recall it.

Q. Was that conversation carried on in your presence with Captain McCall?

A. No, sir.

Q. So he never—Dr. Tross never did say anything to you?

A. Not when he came up, no, sir.

Q. Well, did he say anything to you while he was in the department?

A. Yes, sir.

Q. What did he say to you?

A. I don't recall the conversation. Before I ever talked with Dr. Tross, he had been in the room with Elmer Davis. I didn't talk with Dr. Tross until after he——

Q. How long had you been on duty before Dr. Tross came up there?

A. I don't know. I don't know whether I had even gone on duty or not on my special shift.

[fol. 262] Q. Sir?

A. I don't know whether I had gone on duty or not.

Q. Well, is it possible that you were on duty at the time he came up there?

A. Not on my regular tour of duty, no.

Q. That was one of your extra tours, like the day before when he confessed to you?

A. Mr. Bell, I am on duty twenty-four hours actually.

Q. But you are only required to be on the job in the police station eight hours a day?

A. My requirements run sometimes beyond that, far beyond that.

Q. Unless you are on a special case that you are trying to clear up?

A. Well, that's right.

Q. You and Dr. Tross worked together on the Medlin case, didn't you?

A. No, sir.

Q. Well, you have worked together on other cases, haven't you?

A. No, sir.

Q. Did you work on the Medlin case?

A. No, sir.

Q. You were a policeman, weren't you?

A. That's right.

[fol. 263] Q. You were a member of the Detective Division at that time, weren't you?

A. I don't recall whether I was or not. I don't think I was.

Q. You heard Dr. Tross yesterday testify that he had worked closely with the police in the Medlin case, didn't you?

Mr. Downs: I Object to that.

The Court: Well, I don't remember the exact words that were used by the witness, but I will let you ask this witness if he heard the testimony.

Q. You heard Dr. Tross testify here yesterday, didn't you?

A. Yes, sir.

Q. Well, didn't you hear him testify that he had worked closely with the police in reference to solving the Medlin case?

A. I would not say I heard him say those exact words, no, sir. I heard him say that he worked on the Medlin case. I don't recall whether he said "closely" with any organization.

Q. Well, you heard him testify that he had worked with you in other cases, didn't you?

A. I don't think I heard him testify to that, no, sir.

Q. Didn't you hear Dr. Tross testify yesterday he had [fol. 264] discussed prayer and the benefits and consequences of prayer and other religious matters with you before?

A. No, sir, I don't think I heard Dr. Tross say that.

Q. In other words, you have never talked to Dr. Tross before in your life?

A. Oh, yes. Yes, I have spoken to Dr. Tross many a time.

Q. I say talk to him; I'm not saying speaking to him.

A. Not conversations. I don't think I have ever held any lengthy conversation with him, no more than——

Q. Have you discussed religion at all with him before in your life?

A. I could have; I don't recall. If it was, it was maybe very, very brief.

Q. You heard Dr. Tross say he had assisted the Solicitor in the Medlin case, didn't you, Basil Whitener?

A. I think I remember him saying that the Solicitor came to him about the Medlin case.

Q. Yes, before it was even tried?

A. Possibly before it was tried, yes.

Q. You know that Medlin died over here in the electric chair, don't you?

A. I don't recall, no, sir.

Q. Don't you know that Medlin was tried and convicted in the Mecklenburg County Superior Court and sentenced to die in the electric chair in Raleigh?

[fol. 265] A. With my own knowledge, no, sir, I don't know that.

Q. In fact, you don't know nothing about the Medlin case?

A. I don't recall anything about it, no, sir.

Q. You don't even know that Medlin was accused of murder?

A. Only from conversation in here yesterday.

Q. Before yesterday you didn't even know anything about the case?

A. I may have known something about it, but I had never worked on the case, I had nothing to do with it.

Q. You couldn't recall what it was all about before yesterday?

A. No. You haven't asked me this, but my memory was refreshed on the Medlin case last night as to who he killed. I had completely forgotten about it.

Q. When a man goes into the Police Department, a preacher, who does he get permission from to go into the jail?

Mr. Downs: Objection.

Q. If you know.

The Court: Objection Overruled.

A. I don't know who he gets permission from; I don't know.

Q. You heard Dr. Tross testify yesterday that he had discussed many matters with prisoners?

A. I heard him say that he had talked with prisoners in jail. I don't know what the matters were.

[fol. 266] Q. You heard him testify yesterday that he had spent nights in jail with prisoners?

A. I think he testified yesterday that he had spent one night.

Q. Who would he get permission from to do that?

A. I don't know.

Q. Has he ever gotten permission from you?

A. No.

Q. You ever let him go in jail to talk to any prisoners?

A. No, sir, he hasn't ever gotten any permission; I haven't given it to him.

Q. Lieutenant, were you present when this confession was typed up? Will you refer to Petitioner's Exhibit No. 2 and Petitioner's Exhibit No. 3, these two pages. Were you present when they were typed?

A. Yes, sir.

Q. Who typed them?

A. Claude Davis, secretary to the Detective Bureau, at that time.

Q. I hand you Petitioner's Exhibit No. 2 and ask you if your name appears on that?

A. Yes, sir.

Q. When did you sign it?

A. After this had been typed.

Q. Well, you know you signed it after it had been typed.

[fol. 267] I asked you when did you sign it. When did you sign it?

A. On what day?

Q. Yes, sir, what day.

A. On the 6th of October.

Q. How soon after it had been typed did you sign it?

A. This will be purely a guess. Possibly some twenty or thirty minutes.

Q. Who was present when you signed it?

A. I believe that Captain McCall, Mr. Hucks, Mr. Fesperman, Elmer Davis, and myself were present. Anyone else I don't recall.

Q. The confession that Elmer Davis made was made to

you; I believe that you have testified before here today that it was made to you, alone, with Elmer Davis?

A. The first confession, yes, to my knowledge.

Q. Look at it a few minutes. I read it yesterday. The contents of that first page was made to you in private with Elmer Davis, in substance?

A. In substance the contents of this first page, yes, sir, was made to me.

Q. In private?

A. In private, yes, sir.

Q. And you related this to Mr. Davis for the purpose of getting it typed?

A. No, sir, I did not.

[fol. 268] Q. Well, who did you relate the confession to?

A. After we came back from the cemetery, to Captain McCall.

Q. You mean to say that you didn't say anything about the confession to anybody until you had taken Elmer to the cemetery?

A. I did to Mr. Hucks and Mr. Fesperman when I called them back in the room just before leaving for the cemetery.

Q. What did you tell them?

A. I told them that he had made a confession to me and that he wanted to go with us out to the cemetery and show us what had taken place.

Q. Was Captain McCall there at that time?

A. I don't believe that he was in the Detective Bureau at that time, no, sir.

Q. Well, did you confer with Captain McCall before you went to the cemetery?

A. No, sir.

Q. So you went on out to the cemetery with Davis and Mr. Fesperman and Mr. Hucks?

A. That's right.

Q. And there he re-enacted the crime?

A. Yes, sir, he went over it with us.

Q. Well, when was this information given to Mr. Davis to type? That's what I am trying to find out.

[fol. 269] A. It was later that same day in the afternoon.

Q. About how long after the confession?

A. You mean the confession to me?

Q. Yes.

A. Possibly from three to four hours.

Q. Well, was there another confession made by Elmer Davis?

A. He related to Captain McCall.

Q. In your presence?

A. In my presence before this was ever typed.

Q. So he went over the thing in detail twice?

A. Yes, sir.

Q. Once to you alone, and then one time to Captain McCall?

A. That's right.

Q. Well, who was there when he related all of this to Captain McCall?

A. I don't recall who all was in the room at that particular time; I don't know; I just don't recall.

Q. What room was this in?

A. This was in Captain McCall's office, the office that we call the first office or the front office.

Q. You were in there?

A. Yes, sir.

Q. Elmer Davis was in there?

A. Yes, sir.

[fol. 270] Q. Who else—Captain McCall?

A. I say I don't recall who.

Q. Was anybody else in there?

A. There possibly could have been; I don't recall, Mr. Bell, who was in there. There could have been two, maybe could have been three; I don't know.

Q. Well, where was Davis at this time? Where was Mr. Davis, the stenographer, when he confessed to Captain McCall?

A. That, I couldn't answer. He was around the building. Now, whereabouts, I don't know.

Q. The truth about the matter, Lieutenant, Mr. Davis wasn't even in the office at that time, was he?

A. Well, not when he was giving any verbal confession to Captain McCall, I don't recall whether he was in there or not.

Q. Well, when did Mr. Davis get in the picture?

A. When Captain McCall called him in there.

Q. Called him in there?

A. That's right.

Q. You say he sit down and re-enacted it for him; he made the third confession to Davis?

A. No, no, I didn't say that.

Q. You just said, now, a few minutes ago that he made the same confession to Captain McCall in your presence?

[fol. 271] A. That's right.

Q. And you say Davis, the stenographer, was not present?

A. To my knowledge he was not; I don't know.

Q. Now, so after that was done, Captain McCall sent for Officer Davis?

A. Yes.

Q. That's right. Then Officer Davis comes in, is that right?

A. That's right.

Q. And he confessed again in front of Mr. Davis?

A. No, I don't think he made any confession in front of Mr. Davis.

Q. Well, where did Mr. Davis get his information from?

A. From Captain McCall as far as I know.

Q. The truth of the matter is this paper writing was written by Captain McCall, wasn't it? Isn't that the truth, Lieutenant?

A. No, sir, it wasn't written by him.

Q. Well, don't you know you were sitting right down there and heard Captain McCall dictate that to Davis? I'm talking about Davis, the stenographer.

A. It was possibly dictated to him.

Q. Well, don't you know that it was dictated? That's right. It was dictated by Captain McCall to Davis, the stenographer, and Elmer Davis hadn't said one word?

[fol. 272] A. Oh, yes, he had.

Q. In front of Davis, the stenographer?

A. Oh, not about it in front of Davis, the stenographer.

Q. Davis, the stenographer, that's right.

A. At that time, no.

Q. That's the truth of it, isn't it?

A. At that time, no.

Q. I say Captain McCall wrote this thing out, and Davis, the stenographer, took it down and typed it out, didn't he?

A. No, sir, Captain McCall didn't write that out.

Q. I say Davis took down the notes?

A. He dictated it, and Davis wrote it down in shorthand.

Q. From Captain McCall?
A. That's right.
Q. And went out and typed it up?
A. That's right.
Q. That's right. At that time Elmer Davis didn't say a word to Davis, the stenographer?
A. To my knowledge he had not.
Q. That's right. You were in there, weren't you?
A. Oh, yes.
Q. Now, Lieutenant, you signed this paper, didn't you?
A. That's right.
Q: Lieutenant, this confession was written—was dictated to Davis in the language and words of Captain McCall?
[fol. 273] A. If Captain McCall dictated it, it had to have been, yes.
Q. That's right. You know that Elmer Davis knows nothing about words like "mausoleum" and other words contained in this paper?
A. No, sir, I don't know that.
Q. This part of this statement: "I have not been promised any reward or hope of reward. I have not been mistreated in any way by any of the detectives or any other person who talked to me. I have been told that I do not have to make this statement and if I do make this statement or answer any questions pertaining to the murder, it can be used against me or for me in a Court of Law." Those are the words of Captain McCall, right?
A. I would say so, yes.
Q. Yes. Elmer Davis never made that statement; never made that statement to you, Captain McCall, or anybody; isn't that true?
A. He didn't make that statement.
Q. That's right. This is the statement and language and Captain McCall's own words?
A. That's right.
Q. Now, officer, you even signed this back sheet here—you signed this back sheet even before Elmer Davis even signed it?
[fol. 274] A. Are you asking me did I?
Q. Yes, sir.
A. I don't know. I don't know whether I signed it before he did or not.

Q. Well, don't you know you testified in Superior Court that you signed that sheet before Elmer Davis signed it?

A. I don't think I testified to that.

Q. Well, you don't even know when Elmer Davis signed it, do you?

A. I don't know whether he signed it before or after I did, no, sir.

Q. Well, you were supposed to be attesting to his signature when you signed it, weren't you?

A. No. To the statement.

Q. Huh?

A. To the statement. Not to his signature.

Q. Well, you were supposed to attest his signature that he signed this written confession, weren't you?

A. No, I don't know as I was.

Q. Well, what did you put your name on it for?

A. I put my name on it after Elmer Davis that that statement was true to the best of his knowledge.

Q. In other words, you tell the Court now that you were signing the confession yourself; is that right?

A. No. I was signing the confession because he said it [fol. 275] was true. I witnessed it because he said it was true.

Q. So you didn't witness his signature?

A. As I say, I don't know whether his signature was on there or not; I don't know.

Q. What signatures were on there that you know about?

A. I don't know of any other signature on there in my own mind, I don't know of any signature. Mine could have been the first to have gone on there, I don't know.

Q. Didn't you testify in Superior Court that at the time you signed this paper that there were signatures on this paper?

A. I don't think I did, Mr. Bell.

Q. Now, Lieutenant, you testified in the Superior Court of Mecklenburg County that when you signed this paper that there were other officers' names on it?

A. No, I won't say whether I testified to that or not, I don't know.

Q. All right, I hand you this book and ask you wasn't this question asked you:

"Do you mean to tell the Court that you would sign a paper writing and would not know who else signed it?

"A. There were other officers named there when I signed, but I do not recall when he signed."

Is that your answer?

A. That was my answer there.

[fol. 276] Q. And there were other officers' names on the confession at the time you signed it?

A. I think I testified here just a few minutes ago that there were possibly other names.

Q. What were the other officers' names on it?

A. I don't—I don't know.

Q. Well, that was your answer in Superior Court?

A. Yes, sir, that was my answer.

Q. All right. And now you still say you don't know whether Elmer Davis's name was on it at that time or not?

A. I sure don't.

Redirect examination.

By Mr. Downs:

Q. Petitioner's Exhibit 2 and 3 is the entire written confession given to you and the other officers by Elmer Davis, isn't it?

Mr. Bell: We Object to that, Your Honor. He has already testified about—This witness told the Court that that confession there was given to Mr. Davis, the stenographer, by Captain McCall, and in his presence. That is what Lieutenant Sykes just finished telling about.

Mr. Downs: Your Honor, I have never asked the witness about that.

[fol. 277] The Court: Objection Overruled. Read the question.

Q. (Read by Reporter) Petitioner's Exhibit 2 and 3 is the entire written confession given to you and the other officers by Elmer Davis, isn't it?

A. Yes, sir.

Mr. Downs: Now, at this time we make a motion to introduce into evidence the Petitioner's Exhibits 2 and 3.

The Court: Very well.

(At this point Petitioner's Exhibits 2 and 3 were marked: Respondent's Exhibits 1 and 2, respectively.)

Mr. Downs: That will be all.

(A recess was taken for lunch from 1:00 P. M. until 2:30 P. M. of the same day.)

Afternoon Session

Mr. Nivens: Your Honor, may we make a motion at this time that we might be permitted to send a copy of the order of appointment of counsel in this case and have it placed in the record subsequently?

The Court: Is there any objection on the part of the Respondent?

[fol. 278] Mr. Downs: Absolutely none.

The Court: Very well, you may do so. I suggest that you submit the copy to counsel for the Respondent that they may see it and understand what you are filing.

Mr. Downs: May I suggest this: The Clerk of Superior Court can make a photostatic copy and certify it, and we have no objection to their putting it in the record.

The Court: Very well.

W. F. Hucks, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. Your name, sir?

A. W. F. Hucks.

Q. You are a member of the City Police Department?

A. I am, sir.

Q. Mr. Hucks, were you a member of the City Police Department of the City of Charlotte on or about the 21st of September, 1959, and theretofore?

A. I was, sir.

Q. How long have you been a city police officer?

[fol. 279] A. Fifteen years last November.

Q. Mr. Hucks, were you one of the detectives assigned to investigate the matter of the death of the late Foy Bell Cooper?

A. I was sir.

Q. In your investigation state whether or not you came in contact with Elmer Davis, Jr., the Petitioner in this case.

A. I did, sir.

Q. Mr. Hucks, during your investigation from the 21st of September up to October the 6th had you ever seen Petitioner's Exhibit No. 1, the Arrest Sheet?

A. No, sir.

Q. Were you aware that there was written on the Arrest Sheet not to permit Elmer Davis to see anyone or to communicate with anyone?

A. I was not, sir.

Q. Did you abide by any such order?

A. No, sir.

Q. Mr. Hucks, how many times a day between the 21st of September, 1959, and October 6, 1959, did you talk to Elmer Davis?

A. I would say every day.

Q. And approximately how long would you talk to him each day?

[fol. 280] A. To the best of my knowledge approximately forty-five minutes or an hour or maybe a little more.

Q. And did you talk to him only during the daylight hours?

A. That's correct, sir.

Q. Did you ever talk to him at night?

A. No, sir. When I was assigned to the particular case, our hours were daylight time all that time for the purpose of investigation of this particular case.

Q. Mr. Hucks, during your investigation of the death of Foy Bell Cooper, did you carry Elmer Davis anywhere or take him anywhere?

A. I did, sir.

Q. And where did you take him?

A. Carried him to Canton, North Carolina, and to Asheville; and after the confession, I carried him to the Elmwood Cemetery where he re-enacted the crime.

Q. What time did you leave to go up to Canton and Asheville?

A. It was approximately 5:00 A.M. in the morning.

Q. And did you take Elmer Davis anywhere other than from the city jail straight to Asheville?

A. I did not, sir.

Q. Well, did you stop off at your home?

A. Yes, sir. Yes, sir. Due to the fact that it was early and I had gone to the station and I hadn't ate breakfast [fol. 281] and on the way to Asheville is in the direction of my home, I stopped by there, and my wife fixed breakfast for myself and Elmer Davis.

Q. Did Elmer eat what was fixed?

A. Yes, sir.

Q. How long did you stay up around Canton and Asheville?

A. He was to show us where he had broken into a house near the railroad tracks which lead from Asheville to Canton, and we walked this some thirteen or fourteen miles from the suburbs of Canton to the suburbs of Asheville. We got there at approximately 11:00 or 11:30 A.M.

By the Court:

Q. Got where?

A. To Canton, North Carolina.

By Mr. Downs:

Q. Mr. Hucks, did you feed Elmer Davis anything or did anybody else feed Elmer Davis anything while you had him out up around Canton and Asheville?

A. Yes, sir. When we arrived somewhere in the neighborhood of 11:30 at Canton, I ordered a meal through the Chief of Police there and carried it to Elmer Davis where he was in the Canton Police Department's jail.

Q. Did you see what you carried him?

A. Yes, sir.

Q. What did you take him to eat up there?

[fol. 282] A. I don't recall; I don't remember exactly what it was. It was a meal. Well, it was a three-course meal, two vegetables and a meat and bread.

Q. Where did it come from?

A. Came from a cafe right around the corner from the Police Department.

Q. And did you eat there yourself?

A. Yes, sir, I ate there, yes, sir.

Q. In other words, this day while you had Elmer Davis out, whatever you ate you fed him too?

A. That's correct, sir.

Q. Did you stop anywhere along the road?

A. Yes, sir, we stopped in Blowing Rock on the way to Canton, and we had a soft drink of some sort; I don't remember what it was; I think I drank a Coca-Cola; I don't remember exactly what type drink he drank, but he got one.

Q. Now, you walked from Canton to Asheville on the railroad tracks, didn't you?

A. Yes, sir.

Q. While you were walking this distance, where was Elmer Davis?

A. Elmer Davis was along with Detective Fesperman; he had the handcuffs on one of his arms and the other end of the handcuff on one of Davis's arms.

Q. Did you stop and rest at any time during that four-

[fol. 283] teen miles?

A. Yes, sir.

Q. Did you force Davis to walk at any time when he didn't want to walk?

A. No, sir. He agreed to walk.

Q. Now, Mr. Hucks, in your contact with Elmer Davis between the 21st of September, 1959, and October the 6th, 1959, did you ever threaten him in any way?

A. None whatsoever.

Q. Did you ever strike him with your hand, fist, or any other object?

A. No, sir.

Q. Did you ever call him a black s.o.b.?

A. I did not, sir.

Q. Did you ever tell him if he didn't confess this murder that you were going to kill him?

A. I did not, sir.

Q. And did you ever hear anybody else threaten him; if he didn't confess this matter, they were going to kill him?

A. No, sir.

Q. From the 21st of September, 1959, through October the 6th, 1959, did you mention, directly to Elmer Davis anything about the murder of Mrs. Foy Bell Cooper?

A. I did not, sir.

Q. Did you tell him that you were investigating the death [fol. 284] of a white woman?

A. I did not, sir.

Q. And while you were interrogating Elmer Davis between the 21st of September, 1959, and October 6, 1959, on any occasion did he request that you cease asking him questions because he was tired or fatigued?

A. No, sir.

Q. Now, what was his general appearance during this particular series of dates, the 21st of September, 1959, through October the 6th, 1959?

A. Are you speaking of his physical condition?

Q. Yes, physical appearance.

A. It was good, good. He was very cooperative.

Q. Have you ever seen Petitioner's Exhibits 2 and 3, the two paper writings here?

A. Yes, sir.

Q. I believe you witnessed the signature of Elmer Davis, did you not?

A. Yes, sir.

Q. Was this paper writing read back to Elmer Davis?

A. Yes, sir.

Q. Both sheets of it?

A. Yes, sir.

Q. And then he signed the second sheet?

A. That's correct, sir.

[fol. 285] Q. Did anybody threaten him in any way to make him sign the paper?

A. None whatsoever.

Q. Did they tell him they were going to kill him if he didn't sign this paper?

A. No, sir.

Q. Did they tell him if he signed that paper they were

going to send him over to the county jail so he could get a hot meal and a bath?

A. No, sir.

Q. Out in the cemetery, Mr. Hucks, did the Defendant Petitioner re-enact the crime for you?

A. He did, sir.

Q. Did anybody show him what to do?

A. No, sir.

Mr. Downs: Examine him.

Cross-examination.

By Mr. Nivens:

Q. Now, Mr. Hucks, along with two or three other officers, you went over to Gaston County to pick up Elmer Davis, didn't you?

A. I did not, sir.

Q. You did not?

A. No, sir.

[fol. 286] Q. When did you first see Elmer Davis after his arrest?

A. The following morning after his arrest that night. I was on the daylight shift, and when I came to work the next morning the particular case was assigned to myself and Detective Fesperman, and at that time we talked to him.

Q. Do you remember the time Captain McCall testified in the Superior Court concerning this matter?

A. I remember that he testified. I don't know too exact what he testified to.

Q. Do you recall him making the statement that he had assigned twenty-eight men to handle this case?

A. I do not.

Q. Did you know that twenty-eight men were assigned to handle it?

A. No, sir, there was not.

Q. Was not the whole detective force assigned to handle this case?

A. Not to my knowledge.

Q. Now, Elmer Davis has never accused you of mistreating him, has he?

A. No, sir.

Q. And so far as you know, he hasn't accused you of mistreating him even in trial, has he?

A. I don't know that anyone has mistreated him. I have never mistreated him.

[fol. 287] Q. I didn't ask you that. I say so far as you know you haven't heard Elmer Davis accuse you of doing anything wrong to him throughout the course of the trial?

A. Me or anyone else.

Q. But I'm talking about in Court. Have you heard him in Court ever accuse you of doing anything wrong?

A. No, sir.

Q. In fact, you were nicer to Elmer than any other officer, were you not?

A. I wouldn't say that, no, sir.

Q. Well, you took him to your home and fed him?

A. I did, sir.

Q. And you bought him peanuts?

A. I did, sir.

Q. And you bought him cigarettes?

A. I did.

Q. Now, you were aware of the fact that he was not being properly fed in jail, weren't you?

A. No, sir.

Q. Well, why did you see fit to feed him?

A. Due to the fact that at that time of morning when we left to go to Canton there was no food at the jail. And I hadn't ate, and I figured he would want breakfast too, and that's the reason I fed him.

Q. Well, did he tell you he was hungry?

[fol. 288] A. I asked him if he wanted anything to eat, and he said, "Yes."

Q. Now, I'm asking you before you asked him if he wanted anything to eat, didn't he tell you that he was hungry?

A. Mr. Nivens, as well as I remember, on the way from the Police Department until I got to my house, I believe I did ask Elmer Davis if he was hungry, and he said, "Yes."

Q. But you are denying that Elmer told you without being asked the question that he was hungry?

A. Not until I asked him he didn't mention it.

Q. Now, you say you were not with the officers that went over to pick Elmer Davis up?

A. I was not.

Q. Now, you are familiar with the fact that when any prisoner or any person is arrested by the Charlotte police force that an Arrest Sheet is made out on that particular person, are you not?

A. That's correct.

Q. I want to know if you know of any other Arrest Sheet in this case other than the one that was just shown to you by Mr. Downs a few minutes ago?

A. Yes, sir, there is a Manila envelope which is in the original handwriting of the officer who arrests this person, and the information is put on that, and this particular sheet is copied from the information on that.

[fol. 289] Q. Now, do you know where that Manila envelope in this particular case is?

A. I do not, sir. I never did see it.

Q. Have you ever seen it?

A. No, sir.

Q. But you do say that what is put on the Arrest Sheet kept by the clerks is the information that comes from the writing on this Manila folder or this Manila sheet that is handled by the arresting officer?

A. I would say so, yes.

Q. Now, you said that you never did mention to Elmer Davis about this crime—mention anything to him about this crime until October the 6th?

A. On the day of his confession, yes.

Q. And yet you talked with him forty-five minutes per day?

A. Yes, sir, I would say so.

Q. Every day?

A. Yes, sir.

Q. And you were not the only one that talked with him, were you?

A. That, I couldn't say, other than Mr. Fesperman and Mr. Gardner and Mr. Porter and Mr. Holmberg.

Q. All right, about how long did they talk to him per day?

[fol. 290] A. That, I couldn't say. They were on a different shift other than Mr. Gardner and I was.

Q. Well, how about Mr. Gardner?

A. Yes, sir, Mr. Gardner had talked to him.

Q. About approximately how long did he talk to him every day?

A. Approximately the same time that I would. He would be there in the presence of myself and Mr. Fesperman.

Q. While you did not mention the crime to him, you did state to him or ask him questions pertaining to the day on which the crime was committed, didn't you?

A. Yes, sir.

Q. Now, Mr. Hucks, isn't it routine that an officer when he is assigned to a particular case that he does investigate or that he does look at the Arrest Sheet?

A. No, sir. That's not necessary. No, sir.

Q. Well that contains the history of the incident, doesn't it?

A. No, sir.

Q. Well, then, what is the purpose of the Arrest Sheet?

A. A matter of records for the desk sergeant or the jailer to know that they have that certain person in custody.

Q. And the jailer is supposed to comply with whatever statement or whatever suggestion or anything that is made on the Arrest Sheet; is that right?

[fol. 291] A. That, I do not know, Mr. Nivens.

Q. Now, did you walk with this other officer who accompanied Elmer Davis from Canton to Asheville?

A. No, sir, not all of the time, no. We had an automobile which I drove the car and would spot-check, go on up the tracks and stop and wait on Mr. Fesperman and Elmer Davis to come up the tracks.

Q. Now, Mr. Fesperman was with him at all times?

A. Yes, sir.

Q. It's mountainous up there between Canton and Asheville, isn't it?

A. That is a mountain area, yes, sir.

Q. And he did have to go up and downhill practically all the way from Canton to Asheville, didn't he?

A. No, sir, not all the way.

Q. Well, it's up and downhill?

A. Your railroad tracks are more or less on a level basis, Mr. Nivens, from Canton to Asheville. The railroad track I would say is comparatively level.

Q. Oh, they cut through the mountains?

A. That's right.

Q. Is that what you are saying?

A. That's right.

Q. Well, it was too far for you to walk, wasn't it?

A. It wasn't too far for me to walk if it was necessary, [fol. 292] no, sir; I would have walked it; I did walk part of the way.

Q. Well, why did you ride?

A. For the simple reason that I would have the car in case we found the place and we could have cut the walk shorter and at that time Davis and Mr. Fesperman could have been picked up and put in the case.

Q. Did you drive?

A. Yes, sir.

Q. Who else was with you?

A. The Chief of the Canton Police Department.

Q. Let me ask you for the record: Did you walk from Canton to Asheville or from Asheville to Canton?

A. Canton to Asheville. From the suburbs of Canton to the suburbs of Asheville.

Q. Well, now, you testified on direct-examination that they stopped occasionally to rest?

A. They did, sir.

Q. Well, how did you know?

A. For the simple reason, Mr. Nivens, like I said I would spot-check and wait in the car or on the tracks, and they would stop there and rest a while, and then they would continue on.

Q. Approximately how long did they stop at these intervals?

A. Oh, I just don't remember.

[fol. 293] Q. Well, was it five minutes?

A. It could have been.

Q. Was it less than that?

A. It could have been.

Q. Well, now, they were not within your view at all times, were they?

A. No, sir, not at all times.

Q. And you don't know what Mr. Fesperman said or done to Elmer Davis—or did to Elmer Davis—when you were not there?

A. I did not.

Q. Now, I believe you said you arrived at Canton about 5:00 o'clock?

A. No, sir, I didn't say that.

Q. What time did you arrive at Canton?

A. I said approximately 11:30 in the morning, 11:30 A.M.

Q. Well, when did you take Elmer Davis out of the jail?

A. Took him out of the city jail at the Charlotte Police Department at approximately 5:00 o'clock in the morning.

Q. And how far is it from Charlotte to Canton?

A. Approximately I'd say a hundred and eighteen or nineteen miles.

Q. You mean it took you about six hours to drive from Charlotte to Canton?

A. No, sir.

Q. Well, you say you arrived in Canton at 11:00 o'clock?

[fol. 294] A. That's right, sir.

Q. What were you doing all of these six hours that you had Elmer Davis prior to the time that you got to Canton?

A. I explained that we stopped at my house and had breakfast, and how long we were there I do not know. We stopped in Blowing Rock.

Q. Well, let me ask you this: Approximately how long were you at your house?

A. I couldn't give you any specific time.

Q. Well, you weren't there over fifteen minutes?

A. Oh, yes, we were there longer than that. It would take my wife longer than that to cook breakfast.

Q. Well, you knew the night before that you were going?

A. I did, sir.

Q. Are you saying that your wife did not begin to prepare breakfast until you had gone and gotten Elmer Davis and brought him back to your house?

A. That is correct.

Q. Well, how long did it take your wife to fix breakfast?

A. I don't remember the exact time.

Q. Well, normally how long does it take?

A. Well, it all depends on what she is fixing.

Q. Well, what did you have that morning, Mr. Hucks?

A. It was eggs and grits and, as well as I remember, sausage I believe.

[fol. 295] Q. Well, now, can't you prepare eggs and grits and sausage in fifteen minutes?

The Court: Just one moment. Does the testimony up to now from the Petitioner, Davis, or anyone else indicate any coercion or threats or mistreatment during the breakfast period or during the ride from there to Canton?

Mr. Nivens: No, sir. I am trying to find out what happened on the ride from Charlotte to Canton, because a lot of evidence is coming out here now that we were not even conscious of at the first trial.

The Court: Does the Petitioner contend that anything occurred on the trip to Canton?

Mr. Nivens: Well, we are trying to find out, Your Honor.

The Court: All right, go ahead.

Mr. Nivens: Will you read the last question?

Q. (Read by Reporter) Well, now, can't you prepare eggs and grits and sausage in fifteen minutes?

A. Could I?

Q. Your wife. I mean normally it wouldn't take no more than fifteen minutes to prepare sausage and grits and eggs?

A. Well, I'd say it taken her longer than any fifteen minutes.

Q. Well, at the longest, what is the longest period of [fol. 296] time you think it would have taken—forty-five minutes?

A. I would say something in that neighborhood.

Q. All right, now, what part of the house did you feed Elmer in?

The Court: Objection sustained. Now, we have got to get along, gentlemen. I don't think it makes any difference what part of the house the breakfast was prepared and served in.

By Mr. Nivens:

Q. All right, after you ate breakfast, how long did it take you to get to Canton?

A. I don't recall, Mr. Nivens. I know we arrived there somewhere in the neighborhood of 11:30 A. M. I don't recall the exact time.

Q. Did you stop along the way anywhere and talk or have any conversation with Elmer before you got to Canton?

A. I imagine we spoke to Elmer and we had a conversation between Charlotte and Canton.

Q. Well, did you talk to him about this murder?

A. We did not, sir.

Q. Now, you were present the morning when Elmer Davis made the confession, weren't you?

A. I was, sir.

Q. When you took Elmer Davis out of the cell, how long was it before he made the confession to Lieutenant Sykes? [fol. 297] A. I don't remember, Mr. Nivens.

Q. You don't remember?

A. No, sir, I don't remember the exact time.

Q. Well, do you remember what happened to Elmer?

A. Well, the best of my memory was that Detective Fesperman and myself was talking to Elmer in Lieutenant Sykes's office, and he requested that he set in on the questioning to learn something of the nature of the case, and during that time Lieutenant Sykes—the question of the lady that was killed was brought up, and——

Q. Wait a minute, now. Will you state that again? What's that about Lieutenant Sykes, and the lady's death being brought up?

A. At that time the lady in question was mentioned; the murder case was mentioned. And at that time Lieutenant Sykes asked Elmer if he wanted to talk to all three of us or did he want to talk to me or to Detective Fesperman or himself. Elmer Davis stated that he would like to talk to Lieutenant Sykes by himself.

Q. Well, then, Lieutenant Sykes knew prior to that time that Elmer was involved in this situation, did he not?

A. Not to my knowledge, no, sir.

Q. Now, explain, if you can, Elmer's attitude at the time you began questioning him about this Mrs. Cooper's death.

Mr. Downs: Objection to the "attitude." He can de- [fol. 298] scribe the demeanor or what he knows.

Q. Well, describe his demeanor.

A. He seemed to be in a very good mood at that time when we were talking to him.

Q. All right, did he answer your questions freely?

A. Well, at that time I left the office when he requested to talk to Lieutenant Sykes. And then after he had made

the confession to Lieutenant Sykes, Elmer very freely and voluntarily went to the cemetery with us to re-enact the crime.

Q. Mr. Hucks, I am asking you about his demeanor prior to his confession.

A. Normal, I would say.

Q. It was normal?

A. Yes, sir.

Q. Now, I want to call your attention to Page 59 of the record proper where you made this statement in the Superior Court of Mecklenburg County:

"In my presence we asked him if he had anything to do with the murder at that time and asked again if he was in the cemetery."

And your reply was: "He was very reluctant and would not speak any at that time."

Do you remember that?

A. Yes, sir.

[fol. 299] Q. "And we asked him several questions in regard to clothing that he had on and where his prison clothes were, where he had discarded them, and he stated that he had discarded his prison clothes in the mountains when he escaped, and this was only approximately ten minutes."

Do you remember that?

A. Yes, sir.

Q. "And Lieutenant Sykes was asking—that was prior to Lieutenant Sykes entering. He was asked to come in, and we asked him several other questions pertaining to the murder."

A. That's right.

Q. Now, at that time Elmer Davis manifested to you a reluctance to answer your questions with regards to this murder, didn't he?

A. That's correct.

Q. And you continued to question him, didn't you?

A. Yes, sir, he was questioned about it.

Q. And you continued to question him until he agreed to go in the office and talk with Lieutenant Sykes by himself?

A. That's correct.

Mr. Nivens: All right, that is all.

[fol. 300] HOMER C. GARDNER, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. Mr. Gardner, what is your name?
A. Homer C. Gardner.
Q. By whom are you employed?
A. By the City of Charlotte.
Q. Detective Division?
A. Detective Bureau, yes, sir.
Q. Of the Police Department?
A. Detective Bureau.
Q. Of the Police Department?
A. Of the Police Department, yes, sir.

Q. Were you so employed in the Detective Division on September 21, 1959?
A. I was

Q. Sometime after September the 21st, 1959, did you have an occasion to go with Officers Hucks and Fesperman to the home of Eloise Sadler, now known as Stowe?
A. I did.

Q. And was Eloise Sadler, now known as Stowe, at home?
A. She was.

Q. Did any of you three officers talk to her?
A. Yes, sir.

[fol. 301] Q. And what did you talk with her about?
A. Talked with her about some clothing that we thought possibly came from her house; talked to her about Elmer Davis being locked up in the city jail, and asked her why she didn't go see her brother on that occasion.

Q. And what did Eloise Sadler, now known as Stowe, tell you why she hadn't been to see her brother?
A. She said she had too many children there was one reason and that she hadn't seen him before in about ten or eleven years.

Q. Is that the only time you ever saw Eloise Sadler, now known as Stowe?
A. Yes, sir.

Q. You continued to work in the Detective Division from the 21st of September, 1959, to October 6, 1959, didn't you?

A. Yes, sir.

Q. And were you there during the daylight hours?

A. Yes, sir.

Q. Did you ever see Eloise Sadler, now known as Stowe, come to the City Police Department in the city jail to see Elmer Davis?

A. I didn't.

Mr. Nivens: Objection.

The Court: What is the basis of your objection?

Mr. Nivens: His not seeing her would not mean any-
[fol. 302] thing. I don't see that it's pertinent—his not seeing her; he wasn't the jailer.

The Court: That's all he is asking; whether he saw her or not. Objection overruled.

A. No, sir, I didn't see her.

Q. Now, Mr. Gardner, did you ever have Elmer Davis in your presence at any time?

A. You mean alone?

Q. Well, alone or with any other person?

A. I questioned him on, I believe, about three occasions.

Q. And were these occasions in daylight hours?

A. Yes, sir.

Q. Did you ever question him at night?

A. Never.

Q. And where did you question Elmer Davis on these different occasions?

A. In the interrogation room in the City Detective Bureau.

Q. And for how long a period of time?

A. I'd say approximately from thirty to forty-five minutes, possibly a little more.

Q. Was anyone else present?

A. Usually Mr. Hucks and Mr. Fesperman.

Q. Mr. Gardner, did you threaten Elmer Davis in any way when you questioned him?

A. No, sir.

[fol. 303] Q. Did you threaten to fram hell out of him?

A. No, sir.

Q. Did you ever threaten to shoot him?

A. No, sir.

Q. Ever call him a black s.o.b.?

A. No, sir.

Q. Ever tell him if he didn't confess you were going to blow his brains out?

A. No, sir.

Q. You had known Elmer Davis for a number of years, hadn't you?

A. Ever since he was a boy about fourteen years old I'd say.

Q. Did anyone ever mistreat Elmer Davis in your presence?

A. Not in my presence, no, sir.

Q. And to your knowledge did anyone ever mistreat Elmer Davis while he was in the city jail from the 21st of September, 1959, to October 6, 1959?

A. Not to my knowledge.

Q. Did Elmer Davis, while you were talking to him, ever complain about being hungry?

A. Not that I can recall.

Mr. Downs: Examine him.

[fol. 304] Cross-examination.

By Mr. Bell:

Q. Mr. Gardner, you say you questioned Elmer Davis on three or more occasions?

A. I said approximately three occasions.

Q. Well, could it have been more than three?

A. It's possible, but that's all I can recall.

Q. Do you think it's possible for it to have been as much as ten?

A. I would say no. I have said as far as I can recall three occasions.

Q. Well, it could be more than three?

A. Well, I say it's possible.

Q. Now, during the entire time that Elmer Davis was in the Charlotte city jail, were you on the day shift?

A. I was on the day shift.

Q. Three weeks right straight?

A. That's correct.

Q. Do you work in the daytime all the time?
A. I work daytime all the time.
Q. You don't work at night?
A. That's right.
Q. You never did see him at night?
A. I might have seen him at night, but I never did question him at night.
[fol. 305] Q. Did you talk to him at night?
A. No, I never did question him at night; I don't believe I did.
Q. Sir?
A. I say if I did, I don't recall it. I don't think I ever questioned him at nighttime.
Q. Well, when do you think you saw him the first time?
A. I saw him the first time when Captain McCall asked me to assist Detective Hucks and Fesperman in this investigation.
Q. Well, what did Captain McCall tell you to do?
A. He just told me to assist Detective Hucks and Fesperman in the investigation.
Q. Well, what kind of investigation was it?
A. Of this murder case.
Q. Well, how did you go about investigating it?
A. Well, normally, why, we try to find out——
Q. I didn't ask you that. How did you go about investigating this murder case, this one?
A. By questioning him.
Q. Questioning him about what?
A. About where he had been since he escaped from the penitentiary and what he had in his possession and as to what he was doing with this in his possession and where he got it.
[fol. 306] Q. All right, what else?
A. Well, I may have done a lot of things, but I——
Q. Well, all right, we want to know about it. That's what this hearing is for. We want to know about it. What else did you ask him?
A. I said I asked him about where he got this stuff and that stuff.
Q. I'm talking about the other things. What else did you ask him about?
A. Well, I haven't got the knowledge about all I asked him.

Q. Did you ask him about Mrs. Foy Bell Cooper?

A. I did not.

Q. Why?

A. Well, I had a reason not to.

Q. Well, what was your reason? Tell the Court your reason for not asking him.

A. I was looking for other evidence at that time.

Q. What other evidence?

A. Where he got all the stolen stuff that he had in his possession.

Q. Why were you concerned about that?

A. Well, I was supposed to be helping with the investigation. What do you want me to do? Sit there and say nothing?

[fol. 307] Q. Well, you could have asked him about this murder case. That's what you were investigating, wasn't it?

A. That's what I'm telling you I did.

Q. You did ask him about the murder case?

A. No, I didn't ask him about the murder case.

Q. Well, why didn't you ask him about it?

A. Well, I didn't ask him.

Q. Well, why? You say you had a reason. Now, give the Court that reason.

A. I said I was looking for other evidence at that time.

Q. No, you told the Court a few minutes ago that you had a reason for not asking him. Now, I want to know that reason.

A. Well, I just got through telling you. I was looking for other evidence at that time.

Q. In connection with this case?

A. In connection with this case.

Q. Well, what other evidence was you looking for, Mr. Gardner?

A. The stolen clothes, where they came from.

Q. Well, that has no connection with this case, does it?

A. Well, how do you know?

Q. I'm asking you.

A. Well, I'm asking you.

[fol. 308] The Court: Well, I think now we have gotten to the question of argument between counsel and witness. You will proceed to something else.

Q. You went and got him, yourself, out of jail?
A. No.
Q. You didn't?
A. No, sir.
Q. Who got him for you?
A. The jailer.
Q. What jailer?
A. A jailer.
Q. Which one?
A. I'm not positive which one.
Q. How did they bring him out?
A. They brought him to the door, and we'd go there to the door and get him.
Q. Did he have handcuffs on him?
A. No, he didn't have any handcuffs.
Q. Did he have any leg cuffs?
A. No.
Q. Well, he didn't have nothing on? I mean no type of apparatus to restrain him?
A. No shackles, no.
Q. No nothing?
A. No.
Q. Just one jailer would come in and get him and carry [fol. 309] him in there, right by himself?
A. Carry him to the door, and we'd take him there and carry him in and question him.
Q. I see. Did you go over there to Gaston County to get him?
A. No.
Q. You don't know anything about the Arrest Sheet either, do you?
A. I don't.
Q. Do you know anybody who does in this case?
A. I don't.
Q. Have you ever heard of it before?
A. I have heard it discussed, but I don't know anything about it.
Q. Well, what did you hear discussed about it?

Mr. Downs: Objection to that.
Mr. Bell: Your Honor, I think that's pertinent. This Arrest Sheet is one of the main things in this case.
The Court: Objection Overruled.

A. I have heard it discussed in Superior Court in Mecklenburg County, North Carolina, and here today.

Q. Those are the only two times?

A. That's the only two times I can recall; I might have before or afterwards.

[fol. 310] Q. Do you know how that information got on that sheet?

A. I do not.

Q. Did you make any inquiry about it?

A. No.

Q. Do you know how we can find out how it got on there?

A. I don't.

Q. You treated Elmer all right?

A. I tried to.

Mr. Bell: All right, come down.

W. O. Holmberg, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. What is your name?

A. W. O. Holmberg.

Q. Mr. Holmberg, by whom are you employed?

A. City of Charlotte Police Department.

Q. Detective Division?

A. Yes, sir.

Q. Were you so employed on the 21st of September, 1959?

A. I was.

Q. On the 21st of September, 1959, state whether or not you had an occasion to go to Belmont, North Carolina, which [fol. 311] is in Gaston County, to pick up Elmer Davis, Jr., and transport him back to Charlotte in Mecklenburg County?

A. I did.

Q. Did anybody go along with you?

A. Detective Porter and Lieutenant Gilleland.

Q. How did you travel?

A. By city automobile.

Q. Where did you pick Elmer Davis up from?

A. Belmont Police Department.

Q. Did you pick him up in Gastonia?

A. No, sir.

Q. Did you talk to Elmer Davis when you picked him up?

A. If we did, I don't recall the conversation.

Q. How did you proceed to pick Elmer Davis up over in Belmont?

A. Through Chief Carpenter. He told us that he had Elmer incarcerated.

Q. You had information, didn't you, Mr. Holmberg, that Elmer Davis was an escaped convict from the Haywood County prison camp where he was serving a long sentence, didn't you?

A. Yes, sir.

Q. At the time you picked him up you knew that, didn't [fol. 312] you?

A. Yes, sir.

Q. And when you picked Elmer Davis up and started to transport him back to Mecklenburg county, did he make any protest about going with you?

A. No, sir.

Q. Did he ever ask you not to take him from Gaston County over into Mecklenburg County?

A. No, sir.

Q. Did he ever say anything to you all the way from Belmont back to Charlotte?

A. If he did I don't recall, sir.

Q. When you got Elmer Davis back over to Charlotte, what was the first thing you did, Mr. Holmberg?

A. Taken him out of the city vehicle and carried him up into the Detective Division.

Q. And there did you proceed to book him?

A. Yes, sir.

Q. How do you book a person? How did you book Elmer Davis on this day? Tell the Court.

A. We have a Manila envelope which is approximately four by eight, and we put their name and age, the race, date of birth, address, arresting officers, where they were arrested, time of arrest, their personal effects, and several other things I can't recall at this moment.

[fol. 313] Q. Did you fill out such an envelope on this occasion?

A. I may have.

Q. Well, either of you or Mr. Porter one did, didn't you?

A. Yes, sir.

Q. And on that envelope do you put on it any facts of the arrest?

A. Yes.

Q. On that Manila envelope?

A. On the Manila envelope.

Q. On this particular Manila envelope that you filled out the day you booked Elmer Davis, do you recall whether or not this was written on there: "Do not allow anyone to see Davis"?

A. No, sir, I don't recall putting that on there.

Q. "Or allow him to use telephone"?

A. No, sir, I don't recall putting that there.

Q. And did you see anyone else put that on there?

A. Not in the presence of Mr. Porter or Lieutenant Gilleland.

Q. Well, you all were the first ones that filled out any information at all on Elmer Davis there in the City Police Department, weren't you?

A. Yes, sir.

Q. And this is the original of the Arrest Record?

A. That's supposed to be, if that's what——

[fol. 314] Q. I'm talking about the Manila envelope.

A. The Manila envelope is the first thing that is made out on anyone.

Q. And from that you make a copy?

A. Yes, sir.

Q. On white?

A. Yes, sir.

Q. And several other copies at the same time?

A. Yes, sir.

Q. Did you ever go back to the place that you booked Elmer Davis and change the facts of arrest and put on there: "Do not allow anyone to see Davis. Or allow him to use telephone"?

A. No, sir.

Q. Did you change any of that envelope at all?

A. No, sir. Whoever made up that arrest envelope be-

tween Lieutenant Gilleland, Detective Porter, and myself, that was it, we were finished with it as far I was concerned.

Q. Did you put anything in the envelope?

A. I don't recall. If he had had a belt, we would have put a belt in there; if he had had a knife, we would have put a knife in it.

(An envelope with enclosures marked for identification: Respondent's Exhibit No. 3.)

[fol. 315] Q. Mr. Holmberg, I now show you an envelope marked for identification as Respondent's Exhibit 3 and ask you to look inside and tell the Court whether or not you have ever seen those matters inside the envelope.

A. I remember seeing the social security card and this blood donor card.

Q. Will you remove those two items from this? Describe for the record the two matters that you say are in this envelope that you have seen before.

A. This is a social security card which is made out to Bishel Bryant Hayes, and the number there on is 243-30-9514. The blood donor's certificate is made out to Mr. Bishel Hayes with a Columbia, South Carolina, address on it, and on the other side of it is a date, apparently a record of when he had given some blood. On the same side is a name, J. W. Isenhour, 2923 Rozell Ferry, Charlotte, N. C.

Q. Where did you ever see these two items that you have described, the social security card, and the blood donor's certificate?

A. Belmont, North Carolina.

Q. And from whom did you get them?

A. It was given to either Lieutenant Gilleland or Detective Porter or myself over in the Belmont Police Department by a Chief Carpenter.

Q. Did you ever ask Elmer Davis about either one of [fol. 316] these matters?

A. I can't recall that, Mr. Solicitor.

Q. Other than this September the 21st, 1959, were you ever again in the presence of Elmer Davis after you booked him on that day?

A. Yes, sir.

Q. Do you recall the next time that you were in his presence?

A. It was Friday prior to his confession.

Q. Did you ever take him out of the city jail and take him anywhere from the period of September the 21st, 1959, until October the 6th, 1959?

A. Yes, sir.

Q. Where did you take him?

A. Carried him to the cemetery, Elmwood Cemetery.

Q. Was it day or night?

A. It was during the hours of daylight.

Q. What were you carrying Elmer Davis to the cemetery for, Mr. Holmberg?

A. We wanted to observe his reaction as we drove about the cemetery.

Q. And how did you proceed to enter the cemetery?

A. We entered on the Ninth Street side.

Q. Where did you go in the cemetery?

A. We stayed on the road surface or the funeral route. [fol. 317] The only time that I can recall stopping is when we came in off of Ninth Street. I asked Detective Porter which route did he want to go, the left or the right. So we decided to go to the left. So we circled the cemetery and came back out.

Q. Detective Porter, the black-headed man in the blue suit, was with you too?

A. Yes, sir.

Q. Where was Elmer Davis?

A. He was in the back seat.

Q. Where was Mr. Porter?

A. In the back seat.

Q. You were driving?

A. Yes, sir.

Q. When you took Elmer Davis from the jail, did you place any restraint on him?

A. Yes, sir.

Q. What did you place on him?

A. Handcuffs to my knowledge.

Q. Anything else?

A. I can't recall.

Q. Did you talk to Elmer Davis during this ride through the cemetery?

A. No, sir, not through the cemetery.

Q. Did you talk to him going down to the cemetery from [fol. 318] the City Police Department?

A. If so, it did not pertain to anything. Just in a jovial manner.

Q. Mr. Holmberg, how many times during this period of time between the 21st of September up until October the 6th, 1959, did you see Elmer Davis?

A. I saw him approximately three times.

Q. And on the occasions other than going to the cemetery, what was your reason to see him?

A. We was asked by Detective Hucks and Detective Fesperman if we would interview or interrogate Elmer Davis for them.

Q. And did you do this?

A. Yes, sir.

Q. Was this in daylight?

A. We were on the 3:00 to 11:00 shift. I can't recall, but it was during the hours of 3:00 to 11:00.

By the Court:

Q. Three in the afternoon.

A. Three P. M. to 11:00 P. M., Your Honor.

By Mr. Downs:

Q. And do you recall what you discussed with Elmer Davis on this occasion in the Police Department?

A. Yes, sir, I do.

Q. What did you discuss with him?

[fol. 319] A. We discussed his abnormal sex habits.

Q. Anything else?

A. No, sir. All we were interested in was that particular thing.

Q. Did you threaten Elmer Davis in any way on any occasion that you saw him, coming from Belmont or driving through the cemetery or in the Detective Division when you talked to him there?

A. No, sir, I never threatened him.

Q. Did you ever strike him with your hand, fist, or any other object at any time you were in his presence?

A. No, sir.

Q. Did you ever see anyone else ever threaten or strike Elmer Davis while you were in his presence?

A. No, sir.

Q. Did you ever tell him that you would kill him if he didn't confess?

A. No, sir.

Q. Did you ever call him a black s.o.b.?

A. No, sir.

Q. Did you ever curse him in any way, Mr. Holmberg, at any time?

A. No, sir.

Q. Did Elmer Davis ever complain to you about being hungry?

[fol. 320] A. I'll say no. Then I would like to say this: that it was on one occasion that we had talked with Elmer —I don't recall whether he asked us or we mentioned food to him, and on that occasion we saw that he was given some milk and an egg sandwich or a hamburger of some sort.

Q. Who bought it for him?

A. Detective Porter and myself.

Q. Out of your own pocket?

A. Yes, sir.

Mr. Downs: You may examine him.

Cross-examination.

By Mr. Bell:

Q. Was that at night, Mr. Holmberg?

A. When was this?

Q. When you were interrogating him and bought him the sandwich.

A. It was during the hours of 3:00 P. M. and 11:00 P. M. I don't know the exact time, but it was only for a short period of time that we talked with him on Friday.

Q. The time that you carried him to the cemetery, was that at night?

A. No, sir. That was during the day.

Q. What time?

A. We had just come on the shift, and things was quiet, [fol. 321] on a Saturday, and Mr. Porter and I got to discussing and sort of outlined what we may want to do.

Q. What did you outline?

A. That we'd sit and talk to Elmer for ten or fifteenth or twenty minutes.

Q. Talk to him about what?

A. Ask him if he may want to go out and have some fresh air or something.

Q. Did you ask him that?

A. Well, I can't recall the exact wording on it, Mr. Bell. I could have said fresh air or to get out or what; I don't know just exactly the phrase I used; it could have been.

Q. You could have asked him that?

A. Yes, sir, I could have.

Q. And then you did take him out for air?

A. I would say that.

Q. Well, what did you take him out for?

A. To go down and observe his attitude or his reactions to the cemetery.

Q. That's the place you say the crime was committed?

A. That is where a murder had been committed, in that area, in that general area.

Q. That's where the murder had been committed?

A. As far as the knowledge I had of the Cooper murder, yes.

[fol. 322] Q. That's what I'm talking about.

A. Yes.

Q. And you carried him out there so that you could observe him while he was looking over the cemetery?

A. His reactions, yes.

Q. What was his reaction?

A. Nothing. There wasn't any reaction, except—I don't know if this is—but the funeral route road to the mausoleum; but as we rode by that, the only thing he done was turn his head and then straighten back up, and that was it.

Q. Well, what impression did it make on you then?

A. He didn't make an impression on me.

Q. Did you discuss it with Lieutenant Porter?

A. What?

Q. About his reaction.

A. About his reaction? Yes.

Q. What did Lieutenant Porter say about it?

A. Detective Porter said, "Did you observe him looking at the mausoleum?" I said, "I did."

Q. What did he say?
A. Nothing. That was it.
Q. That was all?
A. As far as I was concerned, yes.
Q. How many times did Elmer Davis tell you that he did not kill Mrs. Cooper?
[fol. 323] A. I don't recall the number of times, but I believe during one of the interrogations, Mr. Bell, that we asked him if he knew why he was incarcerated.
Q. I didn't ask you that.
A. Well, I'm trying to answer your question.
Q. I asked you how many times——

Mr. Downs: Your Honor, we object, and I want a right——
Mr. Bell: Your Honor—It's not responsive.
The Court: Well, now, just take it easy. We will get all the competent evidence in and we will leave out the incompetent. Read the question.

Q. (Read by the Reporter) How many times did Elmer Davis tell you that he did not kill Mrs. Cooper?
A. (Read by the Reporter) I don't recall the number of times, but I believe during one of the interrogations, Mr. Bell, that we asked him if he knew why he was incarcerated.
Q. (Read by the Reporter) I didn't ask you that.

The Court: (To the Witness) You may continue your answer if it is in answer to the original question.

A. (Continuing) We asked him if he knew why he was incarcerated. If I'm not mistaken, he made the statement that he believed it was due to the fact of the death of Mrs. Cooper. And we asked him at that time, Mr. Porter or [fol. 324] myself—I don't recall which one of us asked him: "Well, did you do it?" And at that time he denied it.

By Mr. Bell:

Q. How many times did Elmer Davis deny to you that he killed Mrs. Cooper?
A. I recall only that one time, Mr. Bell.
Q. Well, how many times did you ask him about it?
A. That one time.

Q. Was this before the confession?

A. Yes, that was before the confession.

Q. How many days or weeks was this before the confession?

A. When he made this denial?

Q. Yes.

A. It was either the Friday or Saturday before he made the confession.

Q. You heard some of these officers testify that nothing had ever been said to him about this murder before the confession, didn't you?

A. He is the one that mentioned it to us. We did not bring the subject up, Mr. Bell.

Q. Why did you ask him if he know why he was being held?

A. Held for what?

Q. That's what you said. You asked him did he know why he was being held?

A. Yes.

[fol. 325] Q. Why did you ask him that?

A. During an investigation you try to get all the background that you can possibly get, to determine——

Q. Well, why did you want him to know? Did you want him to know why he was being held?

A. For my own personal satisfaction, yes, I wanted to know if he had any knowledge of why he was being held, because that helps a detective to determine if he is pursuing the right path of an investigation, whether he should pursue it further or whether he should drop it at that point, and also give the information to a brother officer so he knows how to pursue an investigation.

Q. Did you convey this to your superior officer that he had denied killing Mrs. Foy Bell Cooper?

A. I don't recall who we told, Mr. Bell, but it was told to either Detective Hucks or Detective Fesperman, or it may even have been Mr. Gardner.

Q. Who was your superior officer at this time? I mean who did you work under?

A. Inspector McCall. He was the commander of the detectives.

Q. I know, but did you work at this between September the 21st and October the 6th under any lieutenant?

A. Yes, sir.

Q. Who was the lieutenant?

[fol. 326] A. Lieutenant Gilleland.

Q. Did you tell Lieutenant Gilleland about it?

A. No, sir. Because when he had interrogated him, we kept that information to give it to Detective Hucks and Detective Fesperman or to Mr. Gardner, because they were the ones that were assigned to this particular case.

Q. Now, you gave him some food before he confessed, didn't you?

A. Yes, sir. I made that statement here in open Court.

Q. Before he confessed?

A. Yes, sir. Ah——

Q. Was that the morning just before he confessed?

A. No, sir. I said that it was either Friday or Saturday prior to the confession.

Q. Well, did you give him some food before he confessed, the day he confessed?

A. No, sir. I wasn't even there when that confession was made.

Q. You were not?

A. No, sir.

Q. Why did you give him some food?

A. I believe I testified to this effect, Mr. Bell: that I don't know if Elmer approached us or we asked him if he wanted food; I can't recall.

Q. Well, why did you give him some food, Mr. Holmberg?

[fol. 327] A. It's usually a policy of mine or Mr. Porter's. We usually ask them if they want anything, a soft drink, milk, coffee.

Q. So every man you interrogate or ask a question, you always ask him if he wants something to eat?

A. Yes, sir, we usually ask them if they want a sandwich, cigarettes also.

Q. And you go out and buy it out of your pocket and give it to them?

A. Yes, sir, I sure do.

Q. Every time you talk to a man?

A. Yes, sir, if they request it. If we ask them and they say yes, we get it for them.

Q. And you pay for it yourself out of your personal money?

A. Yes, sir. Because we do not have a fund in the Police Department to take care of such things.

Q. You say you took Elmer out by the mausoleum?

A. I said in the general area. We followed the funeral route.

Q. How close did you get to the mausoleum?

A. I don't know the distance, Mr. Bell.

Q. Did you stop your car at any time out there at the cemetery?

A. One time. When we made our entry into the cemetery.

[fol. 328] Q. You stopped?

A. Yes, sir.

Q. Did you get out?

A. No, sir.

Q. Did you get out at any time while you were out there in the general vicinity of the cemetery?

A. No, sir.

Q. You say that was just as soon as you came on that day, 3:00 o'clock?

A. I said it was after we came on duty. Right after we came on duty, we discussed, sort of laid out our plans as to what we were going to do.

Q. Well, after you observed him and had opportunity to discuss it further with Lieutenant Porter, did you have the impression that Elmer Davis was not guilty?

Mr. Downs: Object to the impression he had.

The Court: Well, yes, I believe we are getting into an issue now that is not before the Court.

Q. So Elmer Davis was right; he was interrogated night and day about this thing, wasn't he?

Mr. Downs: Object to that.

The Court: Objection Overruled.

A. To my knowledge I would not say he was interrogated day and night.

Q. Well, you interrogated him some nights, didn't you?

[fol. 329] A. No, sir, I did not, except on Friday evening.

Q. What time was that?

A. I don't recall the exact time.

Q. Do you know whether it was day or night?

A. No, sir I don't.

Q. Well, he could have been interrogated by you at night, couldn't he?

A. I'll say no and I'll say yes.

Mr. Bell: All right, come down.

JACK W. PORTER, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. What is your name, please, sir?

A. Jack W. Porter.

Q. Mr. Porter, by whom are you employed?

A. The City of Charlotte Police Department.

Q. Were you so employed on the 20th day of September, 1959?

A. Yes, sir.

Q. Are you in the Detective Division?

A. Yes, sir.

Q. Are you one of the officers who went over to Belmont [fol. 330] to get Elmer Davis?

A. Yes, sir, I was.

Q. Did you know that Elmer Davis was an escaped convict at the time you went over there to pick him up?

A. That was my information, yes, sir.

Q. Did you pick Elmer Davis up at the City Police Department in Belmont?

A. Yes, sir.

Q. That is in Gaston County?

A. Yes, sir.

Q. Did you transport him back to Charlotte, Mecklenburg County?

A. We did.

Q. That's all in the same state?

A. Yes, sir.

Q. Did Elmer Davis make any protest whatsoever about being transported from Gaston County back to Mecklenburg County?

A. No, sir, he did not.

Q. Did Elmer Davis talk at all on the way from Belmont back to Charlotte?

A. I don't remember him saying anything coming back, Mr. Downs.

Q. When you got back to the City Police Department with Elmer Davis, Mr. Porter, what did you do?

[fol. 331] A. An Arrest Sheet was made on Davis, and he was placed in the city jail.

Q. Do you know who made the Arrest Sheet?

A. No, sir. It was either Mike Holmberg or myself; I'm pretty sure Lieutenant Gilleland didn't.

Q. On what did you make this Arrest Sheet?

A. On a Manila envelope.

Q. Was it made by typewriter, pen, or pencil, or what?

A. It would have been made in longhand.

Q. On that envelope is there any place for facts of the arrest?

A. Yes, sir.

Q. That's down in the center of the envelope?

A. Down at the bottom.

Q. I call your attention to the center part of the envelope right in the middle, the facts of the arrest; was that on the envelope?

A. Not in that form, no, sir.

Q. Well, I'm asking you did you put on the envelope, "Do not allow anyone to see Davis. Or allow him to use telephone"?

A. No, sir.

Q. Do you know what happened to this Manila envelope, Mr. Porter?

A. No, sir, I do not.

[fol. 332] Q. Did you see Davis any more after you booked him?

A. Yes, sir.

Q. When did you next see him?

A. Several days before he confessed.

Q. And what was the occasion for seeing him then?

A. Mr. Hucks and Mr. Fesperman asked Holmberg and I to interrogate this subject in regards to some articles that he had in his possession when he was caught.

Q. And where did you interrogate him?

A. In the Detective Bureau.

Q. And how long did you talk with him on this occasion?

A. I don't remember, Mr. Downs; it wasn't too long.

Q. Did you see him any more after that?

A. Yes, sir, the following day.

Q. What did you do on the following day?

A. We carried him in the police car out to the cemetery where we made a circle through the cemetery and drove back.

Q. Is that the cemetery where Mrs. Foy Bell Cooper's body was found?

A. Yes, sir.

Q. Did you take this subject by the mausoleum where the body was found?

A. Close by.

Q. And did he make any reaction as he passed this spot?

A. I saw no reaction except turning his head and looking [fol. 333] in the direction of the mausoleum and turned his head straight forward again.

Q. Was this in the daylight or dark?

A. This was in the daylight.

Q. At the time you interrogated him up in the Police Department, was it daylight or dark?

A. Well, it could have been both, if I remember correctly. I'll just leave it that way: it could have been both, because that's the way it is.

Q. At any time you were in the presence of Elmer Davis, did you ever curse him?

A. No, sir.

Q. Did you ever threaten him in any way?

A. No, sir.

Q. Did you ever strike him with your hands, fist, or any other object?

A. No, sir.

Q. Did you ever threaten to shoot him or kill him if he didn't confess to this thing?

A. We didn't even have our guns on when we interrogated him. The answer to that is no, sir.

Q. Did you ever tell him you were going to fram hell out of him?

A. No, sir.

Q. Did you ever call him a black s.o.b.?

[fol. 334] A. No, sir.

Q. Did Elmer Davis ever ask you for any food, Mr. Porter?

A. I'm not sure; I believe he did.

Q. And did you respond to that request?

A. Yes, sir. We got him two hamburgers, I thought it was, and a glass of milk. Of course, I could be wrong; it could have been some other kind of sandwich.

Mr. Downs: Examine him.

Cross-examination.

By Mr. Nivens:

Q. Mr. Porter, Elmer Davis broke out of prison in Haywood County, did he not?

A. That is my information.

Q. What is the county seat of Haywood County?

A. I do not know.

Q. And he was picked up in Gaston County, in Belmont?

A. He was picked up in Belmont, North Carolina, which is in Gaston County.

Q. And under the facts and circumstances of his arrest, the Police Department of Charlotte had no right to pick him up unless they picked him up as a suspect in this murder case?

Mr. Downs: Object to the form of the question.

The Court: Well, that calls for a legal opinion of the [fol. 335] witness, it seems.

Q. Well, you said that Elmer Davis didn't give any protest to coming back to Mecklenburg County, did you not?

A. He did not.

Q. And you didn't ask him his permission to come back to Mecklenburg County, did you?

A. I didn't ask him, no.

Q. And you didn't hear any other officer ask him, did you?

A. Didn't anybody ask him if he wanted to come back, in my presence.

Q. Now, do you know whether or not anybody in the Police Department had gotten permission from the State

Prison Department to bring Elmer Davis to Mecklenburg County?

A. I do not, no.

W. A. McCall, called as a witness by the Respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Downs:

Q. What is your name, please, sir?

A. W. A. McCall.

Q. Captain McCall, by whom are you employed?

A. The City of Charlotte Police Department.

[fol. 336] Q. Were you the Captain of the detectives in September, 1959?

A. I was, sir.

Q. Were you the Captain of the detectives on September the 21st, 1959, when Elmer Davis, Jr., was brought to the City Police Department by Detectives Holmberg, Porter, and Lieutenant Gilleland?

A. I was, sir.

Q. And were you the Captain of the detectives during the time of September 21, 1959, through October the 6th, 1959?

A. I was, sir.

Q. Will you tell the Court how often you saw Elmer Davis during that time?

A. That would be hard to say whether I saw him every day or twice a day.

Q. Well, did you ever talk with him during that time?

A. Yes, sir.

Q. How often would you talk with him?

A. I talked to Elmer Davis one time before the confession.

Q. And where was that?

A. In my office.

Q. And for how long?

A. Oh, I wouldn't say over five minutes, in the presence of Mr. Gardner and Mr. Hucks, and Mr. Fesperman.

Q. Did you ever call the Prison Department of the State

[fol. 337] of North Carolina in regards to Elmer Davis and ask him to be brought to the City Police Department from the jail in Belmont on September the 21st?

A. I did, sir.

Q. And do you recall to whom you talked?

A. Yes, sir, I do, sir.

Q. Who did you talk to?

A. J. D. Wilson in charge of consolidated records, Criminal Division.

Q. And do you recall what day that was?

A. I don't recall the exact date whether it was the next day or the next day after his arrest, but I did call him and inform him that Elmer Davis, who was sent up from Mecklenburg County on an assault on a female with intent to commit rape and robbery, on whom we had been furnished information by the Penal Division, had escaped and had been picked up in Belmont, North Carolina, and we now had him in our jail, in the city jail, and that he was a likely suspect in a murder case which we were investigating.

Q. Did you get any permission, verbal or otherwise, to keep Elmer Davis in custody, Mr. McCall?

Mr. Nivens: Objection.

The Court: Just a moment.

By the Court:

Q. You stated, I believe, that you conferred with a Mr. [fol. 338] J. D. Wilson?

A. Yes, sir.

Q. Who was in charge of the consolidated records of the State Prison Department?

A. Yes, sir.

The Court: All right, now, what is the basis for your objection?

Mr. Nivens: It's hearsay.

The Court: Do you propose to put on Mr. Wilson as a witness?

Mr. Downs: Not at this time, no, sir.

The Court: Well, do you contend that that evidence is competent in the absence of the testimony of Wilson?

Mr. Downs: Your Honor, I think, possibly, for the record it would be competent for Captain McCall to state what

the person on the other line said, whether it's true or not.

The Court: But you don't propose to put on Mr. Wilson as a witness?

Mr. Downs: Not at this time, no, sir.

The Court: What do you mean by "at this time"? Do you mean at this hearing?

Mr. Downs: That's correct.

The Court: I don't believe that testimony would be com-[fol. 339] petent, unless you have some authority to indicate that it would be. Objection sustained.

By Mr. Downs:

Q. After your conversation with Mr. J. D. Wilson of the State Prison Department, did you continue to keep Elmer Davis in custody?

A. We did, sir.

Q. Did you receive any request from the State Prison Department, after your telephone conversation with Mr. Wilson, requesting you to turn the prisoner over to them?

Mr. Nivens: Objection.

The Court: What is the basis for that objection?

Mr. Nivens: That would be hearsay, Your Honor.

Mr. Bell: Aside from the point that it is hearsay, he hasn't laid the proper foundation for asking him any question about anything that Mr. Wilson said, because the only statement that he has made with regards to Mr. Wilson is that he is in charge of the records. Does that within itself give Mr. Wilson authority to give him permission to hold a prisoner?

The Court: Objection sustained.

By Mr. Downs:

Q. Now, Captain McCall, were you present on October [fol. 340] the 6th, 1959, when Elmer Davis made his confession to you and to Mr. Sykes?

A. I was, sir.

Q. And where was this confession made to you and Mr. Sykes?

A. The confession was made in the presence of Lieutenant Sykes, Mr. Gardner, Mr. Hucks, and myself, after

they had returned from the cemetery where I was informed that Elmer Davis had re-enacted the crime scene.

Q. Did you dictate a written statement to your stenographer there, Mr. Claude Davis?

A. I did, sir.

Q. Was that statement dictated in the presence of Elmer Davis?

A. It was, sir.

Q. Was it reduced to typewriting?

A. It was, sir.

Q. And then what did you do with the written paper after it was reduced to typewriting?

A. It was read to Elmer Davis in the presence of the witnesses that signed the statement. Elmer Davis followed the statement with his finger laying on the top of my desk.

Q. Have you ever seen Respondent's Exhibits 1 and 2?

A. I have, sir.

Q. Is that the written statement to which you refer?

[fol. 341] A. It is, sir.

Q. Is Elmer Davis's signature affixed to the second page thereof?

A. It is.

Q. Is that a statement consisting of two pages?

A. It is.

Q. As you follow down that statement, did you read everything on it to Elmer Davis?

A. Every word.

Q. Did he tell you whether or not the statement was true or false?

A. He did say that it was a true statement.

Q. I call your attention now to Petitioner's Exhibit No. 1 and ask you if you have ever seen that exhibit?

A. I have, sir.

Q. Is that the Arrest Record in this matter?

A. That is the Arrest Record that was introduced in the Superior Court the first time I saw it.

Q. Do you know how the words, "Do not allow anyone to see Davis. Or allow him to use telephone," was placed on that record?

A. There is a possibility that I had it put on.

Mr. Bell: We object to the possibility. Let him testify to what he knows.

The Court: Yes. Objection sustained.

[fol. 342] By Mr. Downs:

Q. Do you know how the words, "Do not allow anyone to see Davis. Or allow him to use telephone," got on that record?

A. I do not, sir.

Q. Captain McCall, did you threaten Davis in any way at the time he made the statement to you which was reduced to writing as Respondent's Exhibits 1 and 2?

A. I did not.

Q. Did you tell him that you would kill him if he didn't sign that statement?

A. I did not, sir.

Q. Did you tell him that you would fram hell out of him?

A. I did not.

Q. Did you tell him that you would blow his brains out?

A. I did not.

Q. Did you call him a black s.o.b.?

A. I did not.

Q. Did you use any curse words or profanity around him at all?

A. I did not.

Q. Did Elmer Davis ever complain to you, Captain McCall, as the captain of the division which was investigating this matter, as to whether or not he had been mistreated in any way?

[fol. 343] A. He did not.

Q. Did he ever ask you for food?

A. He did not.

Q. Did you tell him at the time he signed this confession, Respondent's Exhibits 1 and 2, that if he signed that that you would see that he was taken over to the county jail and given a hot meal and a bath?

A. No, sir, I did not.

Q. The jail back where Elmer Davis was kept had showers in it during this time, didn't it?

A. It does and had.

Q. And the jail was well ventilated?

A. It is.

Q. Well lighted?

A. It is.

Q. Elmer Davis was not treated back there any differently from any other prisoners which you were holding in custody?

A. He was not, not to my knowledge.

Q. You did not charge Elmer Davis, Captain McCall, with any offense until he had signed this written statement on October the 6th, 1959, did you?

A. He was not charged.

Q. And then what was he charged with?

A. With murder and rape.

Q. On whom?

[fol. 344] A. Mrs. Foy Bell Cooper.

Q. The person to whom Davis referred in that statement?

A. That's right.

Mr. Downs: Examine him.

Cross-examination.

By Mr. Bell:

Q. Captain, how many men do you have in your division?

A. At that particular time I think there was twenty-nine in the Detective Bureau.

Q. And these men work around the clock?

A. I don't believe we were working around the clock then. I think we were working two shifts in 1959.

Q. What were the hours?

A. Seven to 3:00, and 3:00 to 11:00.

Q. Did you assign all your men to this case?

A. Mr. Hucks and Mr. Fesperman were the two officers that had the case assigned to them. All detectives in a major case of this type and any member of the Police Department is always assigned as a matter of any information that might come to their attention, which would be naturally turned over to the detectives that the case is assigned to. Mr. Gardner was asked to assist them in this case, because he had known Elmer since he was a boy. In fact, Elmer lived right in his back yard. I hope I'm not incorrect, but [fol. 345] I am almost positive that Mr. Gardner handled the case for which he is now serving time.

Q. Now, Captain, do you know whether all of these men talked to Elmer?

A. No, sir.

Q. Do you know how many did talk to him?

A. I don't believe that anybody talked to him, Mr. Bell, with the exception of the men that you have heard testify yesterday and today. Now, whether Lieutenant Gilleland spoke to him or what Lieutenant Gilleland had to say to him on transferring him from Belmont to the city jail, I couldn't say.

Q. Well, anyway, he was interrogated night and day?

A. No, sir, I wouldn't say that he was interrogated night and day; and as previously testified, we don't interrogate anybody night and day, not under my command.

Q. Well, you heard Mr. Holmberg and Mr. Porter testify that they were working from 3:00 to 11:00 didn't you?

A. That's right.

Q. And you heard them say they had interrogated him on several occasions?

A. That's right.

Q. And they were working at night at the time this matter was being investigated?

A. I heard them also testify that on the Saturday they [fol. 346] took him to the cemetery, it was immediately after they came to work and that they had planned, after they had interrogated him on Friday about his unnatural sex life, that they had planned—what they had planned on doing Saturday, and they took him out immediately after they came to work at 3:00 o'clock. Very, very, very seldom is a prisoner ever took out of jail at nighttime, especially away from the station.

Q. Well, Captain, what I meant was that he was talked to at night in the station.

A. He could have been.

Q. You do have men talk to men at night in the station?

A. Yes, sir.

Q. Around the clock?

A. No, sir.

Q. Don't you have a shift that comes on at 11:00 and works until 7:00?

A. Not of detectives.

Q. Didn't you have a shift that worked until the morning hours?

A. No, sir.

Q. Say, until 7:00 or 8:00 o'clock in the morning?

A. No, sir. They come to work at 7:00, 8:00, and 9:00. They were coming to work at 7:00 and at 3:00 at this particular time.

[fol. 347] Q. And so at this particular time you didn't have any detectives on duty after 11:00 o'clock at night?

A. As well as I remember, no, sir. We had detectives after nighttime acting as regular cruising cars; and if the occasion arose that a felon was committed, they were called in to investigate. But we found that we were losing time and losing the investigative hours, so we did away with the night shift. I believe that was '56 or '57.

Q. Did you order them to walk this man from Canton to Asheville?

A. I wouldn't say that I ordered them. I knew that they——

Q. Well, I want you to answer my question. Did you order it or did you not?

A. I agreed that he should go to Asheville.

Q. Agreed with who?

A. Mr. Hucks and Mr. Fesperman and Mr. Gardner.

Q. I'm talking about the fourteen-mile walk from Canton to Asheville.

A. Did I order it?

Q. Yes, sir.

A. No, sir. It was agreed.

Q. Agreed among who?

A. The four of us.

Q. That you all would walk him from Canton to Asheville?

[fol. 348] A. No, sir. He was willing to go to Asheville and show them where he broke in the house and got the clothes.

Q. He didn't suggest walking from Canton to Ashville, did he?

A. I didn't say he did.

Q. Who suggested that?

A. He was going to show them that that was the span that he had broken into.

Q. Who suggested walking from Canton?

A. That was the only thing they could do, because it was on the railroad.

Q. Didn't they have leg cuffs on him at that time?

A. No, sir.

Q. They carried them with them?

A. Yes, sir, any time we transport a prisoner, we carry leg irons.

Q. That is what I mean. He had them on when he walked from Canton to Asheville?

A. No, sir, not from what I heard of the testimony.

Q. You heard the man say he had him handcuffed with one hand during the entire walk?

A. I heard him say he had him handcuffed.

Q. Officer, are you familiar with this railroad?

A. No, sir. All I know is it's a railroad.

Q. Well, it's hilly country?

[fol. 349] A. Yes, sir, but you don't put railroads in climby mountains.

Q. Captain McCall, do you know how this information about his not being allowed to talk to anyone or to use the telephone got on the Arrest Sheet?

A. No, sir.

Q. Have you ever tried to find out?

A. Yes, sir.

Q. What did you find out?

A. In the Superior Court you asked for the original Manila envelope, and I took the liberty to go to the county jail and try to find it for you, because you know that that is usually transferred with the prisoner to the county jail.

Q. Captain, I believe you testified in the Superior Court of Mecklenburg County at the time this case was tried there that you didn't intend or that you did not want Elmer Davis to talk to anybody; is that true or not true?

A. Now, I wouldn't——

Q. I want you to answer the question yes or no.

A. If you will show me the record in this Court, I will be glad to say whether I did or whether I didn't.

Mr. Downs: What page are you asking about?

Mr. Bell: Page 395.

Q. Is this your answer here: "No, I did not want him to talk to anybody"? Is that the answer?

[fol. 350] A. That is the answer on this particular page that bears my name at the bottom.

Q. Does that show——

A. Wait a minute. Will you read the two sentences before that?

Q. "I say you did not want him to talk to anybody? Answer: Well, as a result of his being an escaped convict."

A. That is exactly right.

Q. So you didn't want him to talk to anybody?

A. That is exactly right.

Mr. Bell: Come down.

A. (Continuing) Wait a minute. I have a right to——

Q. I want you to come down.

The Court: Go ahead and finish your answer if you desire.

Mr. Bell: I mean I don't want to ask him anything further.

A. (Continuing) I didn't want anybody to talk to him without me knowing it as he was a prisoner of the State of North Carolina, and he was a C grade prisoner and not entitled to visitors without the permission of the warden.

Mr. Bell: All right, sir, that's all.

Mr. Downs: Your Honor, that is the evidence for the Respondent.

[fol. 350] The Court: Any further evidence for the petitioner?

[fol. 351] Mr. Bell: No further evidence, Your Honor.

The Court: Well, gentlemen, if you desire to do so, I think it would be helpful to the Court if counsel for the Petitioner and counsel for the Respondent would file with the Court a memorandum or brief or written argument, as you prefer, with respect to what you contend to be the appropriate findings of fact, conclusions, and the issue or issues, as the respective sides may contend, are before the Court in this hearing.

Mr. Downs: Your Honor, let me make motion here. I have not introduced Respondent's Exhibit No. 3 into evidence, and I would like to withdraw whatever admission there is of that.

The Court: Yes. You had it identified, as I recall, and you asked the witness about a social security card and a blood donor card. Is there any objection to the withdrawal of that exhibit?

Mr. Bell: No, sir, Your Honor.

Mr. Downs: Let me make this request of the Court. There are two exhibits in evidence as Respondent's Exhibits 1 and 2 and Petitioner's Exhibits 2 and 3. They

were personally signed for by me to the stenographer at [fol. 352] the Mecklenburg County Superior Court. Would it be possible for the stenographer here to give me a receipt for those documents?

(It was stipulated that a photostatic copy of Petitioner's Exhibit 1 might be placed in the record in lieu of the original, and also that carbon copies of Petitioner's Exhibits No. 2 and 3, also marked Respondent's Exhibits 1 and 2, might be placed in the record in lieu of the originals thereof.)

The Court: The motion of Mr. Downs to be relieved of responsibility with respect to the filing of the brief or memorandum on behalf of the State is allowed.

(The parties were allowed sixty days after receipt of transcript in which to file briefs.)

[fol. 353] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 354] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

PETITIONER'S EXHIBIT No. 1

Last Name	First Name	Initials	Aliases and place of birth	Arrest No.
M Davis	Elmer	Junior	Gaston Cnty N.C. 7-28-27	P 3515

Residence	Sex	Color	Age	Comp.	Hair	Eyes
None	M	C	32	Choc	Blk	Brown

Cell	Time of Arrest	Date	Complainant
92	11:00 PM	9-21-50	

Charge	Place of Arrest	Arresting Officers
Murder & Rape	Belmont Police Dept.	W. O. Holmburg Lt. Gilleland & J. W. Porter

Facts of the Arrest — Names of Prosecuting Witnesses

Hold for Hucks & Fesperman Re-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to use telephone

Released on $ _____ Bond by _____ at _____ M _____ 19

Final Disposition

Found: Guilty / Not Guilty — as charged — Fine $_____ Cost $_____ Date 10-7 1950

Sentence: Months_____ Days_____ Docket No. 10091

Judge: Other Disposition PHW Bound over to Superior Court—No Bond

Desk Officer: HLR Nothing

Charlotte Police Department

Arrest Record

Fingerprint No. #15609

[fol. 355] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

PETITIONER'S EXHIBIT NO. 2

October 6, 1959.

File

Statement of Elmer Davis, Jr., concerning the murder of Mrs. Foy Bell Dixon Cooper on September 20, 1959:

My name is Elmer Davis, Jr. I am now an escaped convict from the Haywood County Prison Camp, where I was serving a setence for assault with intent to commit rape and robbery of not less than 17 or more than 25 years. I was arrested on Monday, September 21st by the Belmont, N.C. Police Department, where I was fixing to go to my aunts house. I am now going to give you a statement relative to the woman being strangled and choked to death in Elmwood Cemetery on Sunday afternoon, September 20th. I have not been promised any reward or hope of reward. I have not been mistreated by any of the detectives or any other person who has talked with me. I have been told that I do not have to make a statement and if I do make a statement or answer any questions pertaining to this murder, it can be used against me or for me in a court of law.

I have talked with several detectives in the last few days about this woman who was choked to death and raped in the cemetery on September 20th, Sunday afternoon. Today, October 6, 1959, I was talking with Lt. Sykes and Dets. Hucks and Fesperman, and in discussing it, I told them that I would go with them to the cemetery and show them exactly how I grabbed the woman, where I placed her behind the large tombstone, how I grabbed her, how I threw her down and how her head hit the corner of the tombstone, how I choked her with my bare hands and how I tore her pants off, how I sucked her pussy, how I carried her over the wire fence between the white and the colored cemetery, as nearly as possible the same route that I carried her to the mausoleum in the colored cemetery, how I pushed her thru the small hole in the right hand door, and since the hole has been nailed up, I explained how I

pushed her thru, crawled in over her and placed her face down on the floor, her head being up in the left hand corner as you enter and her feet to the left hand side of the mausoleum or house. I showed them where I put her pocketbook (belonging to the woman) and her glasses in the hedge. When we returned to the office, we had another talk and I was told that it was necessary for me to show them where I put my prison shoes and clothes that I was wearing when I choked this woman to death in the cemetery. We went back to the Southern Railroad tracks at the 7th St. entrance to the cemetery, where I showed them my shoes that I was wearing when I committed the crime. The place that I left my shoes, there was a white man drunk, I suppose, and passed out. I took his shoes off and put them on my feet, and also took his socks off and put them on. I took his billfold which had no money, but had a social security card, some pictures and other papers. All of this I had on me when I was arrested by the Belmont officers the following night. I then took the detectives to where I threw away the shirt and pants that I was wearing when I choked the woman in the cemetery. I told the detectives that the pants and shirt I was wearing, I took off a clothesline in the back yard somewhere off the P & N tracks to the west side of Charlotte. I then took them to where I had thrown the pants and shirt down an embankment off the P & N railroad, that I was wearing when I choked this woman to death in the cemetery.

I know one thing, that when I grabbed the woman sitting on the bench with a newspaper under her, I choked her and dragged her to where I dropped her behind a big tombstone where, as I told you, I tore her pants on the side and choked her, using a lot of pressure. I am sure that in the struggle when I threw her down, back of the tombstone, that her head hit the corner of the tombstone, because she was bleeding some from the head. The handkerchief that I had in my pocket when I was arrested was one I used the wipe my mouth in the cemetery after I finished sucking her pussy. Another thing I remember is that when I grabbed her, a little dog was sitting on the ground beside the bench. I did not pay any attention to the dog, and do not know what happened to it.

[fol. 356] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

PETITIONER'S EXHIBIT No. 3

October 6, 1959.

Page Two of Statement of Elmer Davis, Jr., concerning murder of Mrs. Foy Bell Dixon Cooper on September 20, 1959:

In closing, I want to say this. I have known in my own mind that you people were holding me for, and all the time I have been lying in jail, it has been worrying me, and I knew that sooner or later, I would have to tell you about it.

I have made this statement freely and voluntarily. Captain McCall has dictated this statement in the presence of Detectives W. F. Hucks, E. F. Fesperman, H. C. Gardner, C. E. Davis, and Detective Lieutenant C. L. Sykes. I am glad it is over, because I have been going thru a big strain.

Elmer Davis, Jr.

C. L. Sykes, Detective Lieutenant. W. F. Hucks, Detective. E. F. Fesperman, Detective. Homer C. Gardner, Detective. Claude E. Davis, Jr., Detective.

[fol. 357] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

Civil No. 1302

Cri. O B#9 P. 2792

ELMER DAVIS, JR.,

v.

STATE OF NORTH CAROLINA

OPINION AND ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS—September 6, 1963

This is an application for a writ of habeas corpus on behalf of Elmer Davis, Jr., now confined in the State Prison at Raleigh, North Carolina, under a sentence of death imposed by the Superior Court of Mecklenburg County, North Carolina, upon the applicant's conviction of murder while perpetrating the crime of rape.

The basis of the application is the admission of a confession in the state trial which the applicant contends was involuntary and obtained in violation of his right due process as guaranteed by the Fourteenth Amendment to the United States Constitution.[1] At the trial objection to the introduction of the confession on this ground was timely made and determined adversely to the applicant. The finding of the trial Judge was affirmed on appeal as supported by substantial evidence. State of North Carolina v. Davis, 1960, 253 N.C. 86, 116 S.E.2d 365, rehearing denied November 18, 1960, cert. denied, 1961, 365 U.S. 855, 81 S.Ct. 816, 5 L.Ed. 819. Thereafter, application was made to this court and relief was denied without a hearing upon consideration of the state court records. Davis v. State of North Carolina,

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[1] A written confession and several oral confessions were admitted in evidence at the trial. Inasmuch as the evidence reveals substantially similar attendant circumstances, the confessions are treated alike.

D.C.N.C., 1961, 196 F.Supp. 488. The Fourth Circuit [fol. 358] Court of Appeals, 310 F.2d 904, reversed and remanded for a hearing. Accordingly, a plenary hearing was held in order to determine the unresolved issues of fact surrounding the confession.

The facts in the case are sharply in dispute. The evidence offered at the time of trial is set out in the above-cited opinion of the North Carolina Supreme Court and is substantially the same as that produced at the hearing before this court.[3] Upon consideration of the record in the state court and the evidence offered at the hearing, the court finds the following historical facts:

1. On September 21, 1959, the day after the murder of Mrs. Foy Bell Cooper in Charlotte, North Carolina, Elmer Davis, Jr. was arrested and brought to the city jail in Charlotte, where he was held until October 6, 1959, the date of his confession.

2. At the time of arrest Davis was an escapee from a North Carolina prison where he was confined under sentences of 17 to 25 years for robbery and assault with intent to commit rape.[3] He was wearing clothing other than his prison uniform and had in his possession several articles of women's underwear and a billfold containing papers bearing the name of Bishel Buren Hayes.[4]

[fol. 359] Davis had been previously convicted of five criminal offenses, including housebreaking and entering, larceny, robbery, and assault with intent to commit rape, and had served three prior prison sentences aggregating 7 to 8 years in addition to his current sentences of 17 to 25 years. He had escaped four times during his several prison

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[3] All of the witnesses who testified at the state trial concerning the confession testified at the hearing on this application, and three additional witnesses: G. S. Ross and Harold Fesperman of the Charlotte Police Department, and Eloise Stowe, the applicant's sister.

[3] These offenses had been committed within two blocks of Elmwood Cemetery, the scene of the Cooper murder.

[4] Hayes testified at the state trial that he had been drinking heavily near Elmwood Cemetery on the day of the Cooper murder and that his billfold, shoes, and socks were taken from him while he was asleep.

terms, resulting in additional prison sentences. Davis was 29 years old. He had completed the third or fourth grade, and from his testimony at the hearing he appeared to be of low average intelligence.

3. Upon taking Davis into custody, the police notified the State's Director of Prisons and obtained permission to hold the prisoner pending an investigation of the sources of the articles found in his possession at the time of arrest and his activities since his escape. At all times from September 21 through October 6, Davis was held under the authority of the North Carolina Director of Prisons and was serving the sentences from which he had escaped.

4. The Charlotte City Jail, where Davis was confined, is an "overnight" jail without facilities for the preparation of hot meals. Prisoners who are held by the Charlotte Police Department for more than a few days are generally confined in the Mecklenburg County Jail in Charlotte, where cooking facilities are available. Prisoners in the city jail are fed twice daily, each meal consisting of two or more sandwiches. While confined, Davis received food similar to that of other prisoners at regular intervals: During one day, he received two hot meals outside the jail and on another occasion received two hamburgers and milk. Periodically, he was provided with peanuts, soft drinks, cigarettes, and like items. On one occasion he informed the officers that he was hungry and they furnished him food. Otherwise, he made no complaint to the jailers who fed [fol. 360] him or to the officers who talked with him that he was hungry or that the food was inadequate. Subsequent to October 6, he stated that he had been well-treated in this respect. There was no attempt by the police to weaken the prisoner by inadequate feeding.

5. The cell in which Davis was held was similar to the other cells in the jail, six by ten feet, equipped with a bed, mattress, drinking fountain, and commode. Ventilation was supplied by ceiling fans. Davis was permitted to use a shower bath located near his cell.

6. From September 21 through October 6, neither friend nor relative saw the applicant; however, he was not held incommunicado and he would have been permitted visitors had they come to the city jail and requested to see him. Davis' sole request for visitors was to see his sister, Eloise

Stowe, who lived in Charlotte. The officers to whom he made this request contacted his sister and conveyed this message to her. He made no request for counsel.

7. The investigation into the death of Mrs. Cooper was conducted by the Detective Division of the Charlotte Police Department, under the supervision of Captain W. A. McCall. The Cooper case was specifically assigned to Detectives W. F. Hucks and Harold Fesperman. From September 21 through October 6, Detectives Hucks and Fesperman talked with Davis once or twice daily. The interviews were conducted in the detectives' interrogation room of the city jail during the daytime and were approximately one hour long. Davis was a suspect in the Cooper case from the time of his arrest because of the nature and location of the crime; however, the questions prior to October 3 were directed to his background, the sources of the articles in his possession at the time of arrest, and the [fol. 361] thefts and unlawful entries which Davis told the officers he had committed after his escape in the vicinity of Asheville, North Carolina. During this period the officers attempted to verify his statements, and Davis was taken to Asheville and vicinity in order to identify the scenes of the crimes to which he professed. Detective Homer C. Gardner, who had known Davis previously, assisted Hucks and Fesperman in the interrogation of Davis on three occasions.

8. On October 2 Detectives Jack W. Porter and W. O. Holmeberg questioned Davis for a short period of time on two occasions concerning his abnormal sex habits. During the afternoon of October 3 Detectives Porter and Holmeberg asked Davis if he would like to go out for some fresh air. They took Davis in an automobile through the Elmwood Cemetery, the scene of the rape-murder, but failed to observe any reactions.

On the afternoon of October 3 the Cooper case was mentioned to Davis for the first time. Detectives Holmeberg and Porter asked Davis if he knew why he was incarcerated. Davis replied that he believed it was because of the death of Mrs. Cooper. He was then asked if he committed the crime and he denied it.

9. On October 5 Davis was interrogated concerning the Cooper case a second time. Detective Hucks asked Davis what he knew about the murder and his whereabouts on

September 20. He stated that he was in Belmont on that day. He again denied committing the crime.

10. On October 6, at about 12:30 p.m., Davis was questioned for the third time concerning the death of Mrs. Cooper. He was questioned by Detectives Hucks and Fesperman in the city jail in the office of Detective Lieutenant Sykes. Lieutenant Sykes, who had been on vacation during [fol. 362] the period of Davis' confinement, came to his office during the questioning and requested that he be allowed to sit in. Sykes had known Davis' family and had talked with Davis some years before concerning other offenses. Davis was asked if he had anything to do with the murder and if he was in the cemetery on the day of the crime. He was asked where he had discarded his prison clothes and where he had obtained the clothing he was wearing and other items of personal property. Davis stated that he had discarded his prison clothes in the mountains when he escaped. He told the officers where he had obtained the clothing and other effects. He would not answer questions concerning the death of Mrs. Cooper. About 12:45 p.m. Lieutenant Sykes asked Davis if he would like to talk to any of the officers alone concerning the death of Mrs. Cooper. Davis stated that he would like to talk to Lieutenant Sykes. Hucks and Fesperman left the room. Sykes observed that Davis was holding a testament which had been distributed to prisoners by the local churches. Thereupon, the following colloquy occurred:

Sykes: "Elmer, have you been reading the scriptures?"

Davis: "I have."

Sykes: "Since you have been here have you also talked with your Almighty?"

Davis: "I have not; I do not know how to pray. I wish you would pray for me."

Sykes then offered the following prayer:

"O God, You are now a witness to and the watcher over both of us. I have been asked to pray. I want You to be with me in this prayer. I want You to watch over the person that is present with me; also be with me. I do not only ask prayers for myself, I ask for You to be with all people."

[fol. 363] After a short period of silence following the prayer, the colloquy continued:

Davis: "I'd like to tell you something."
Sykes: "All right."
Davis: "I killed that woman."
Sykes: "What woman, Elmer?"
Davis: "The woman in the cemetery."
Sykes: "Do you want to tell me about it?"
Davis: "Yes, sir."

11. Davis thereupon orally confessed to the rape-murder of Mrs. Cooper and related the details of the crime.[5] Davis then consented to accompany Sykes, Hucks, and Fesperman to the Elmwood Cemetery where he reenacted the crime.[6]

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[5] The oral confession, according to the testimony of Lieutenant Sykes, was as follows:

"He went ahead and related to me how he had gone to the cemetery. He told me how she was sitting on the bench; that he came up behind her and grabbed her and related how he carried her on beyond a large tombstone, and that he laid her on the ground, and that he believed in his opinion that her head had hit the corner of the tombstone; and that at that time he had unnatural relations with her; and that he picked her body up and carried her through a large hole that was in a fence that separated two sections of the cemetery, and carried her to a building and put her through a hole that was in the building and placed her on the floor inside; and that he left, and that she was bleeding when he left, but at the time he thought that she was still living." Transcript, p. 234.

[6] Lieutenant Sykes described Davis' reenactment as follows:

"We proceeded under Elmer's directions to a spot in the cemetery. He informed us that that would be about as close as we could get in a car. We stopped the car under his direction, and he led us to a spot in the cemetery. He showed us a fence that he crossed over. The fence at that time had some shrubbery close to it and some small trees with limbs. He told us how he came over this fence. He showed us a cement bench that a lady was sitting on. He

[fol. 364] Upon his return to the jail, Davis was asked by Chief of Police Jesse James whether he had been mistreated or if anything had been done to him that would cause him to make any statement against his own free will. Davis replied, "Chief, I have been treated all right." Davis then repeated his confession and the details of the crime in the presence of Captain McCall and Detectives Sykes, Hucks, Fesperman, Gardner, and Claude E. Davis, Jr., a police stenographer. The confession was typed and read to Davis. He affirmed the truth of the statements and signed the confession. Thereafter, he was taken to the Mecklenburg County Jail and formally charged with the murder of Mrs. Cooper.

12. From September 21 through October 6, Davis was neither beaten, threatened, nor cursed by the police. At the time of his written confession, he was advised of his

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said she was an elderly lady and said, 'Her back was to me', that she was reading a newspaper, and that he crept up behind her and grabbed her. And from the bench, with him leading us, he went possibly twenty-five or thirty feet . . . away and showed us a large tombstone. This tombstone possibly sat about four to five feet high and possibly three feet wide; and on the opposite side of that he told us that's where he dropped her on the ground, and that in his opinion her head struck the corner of this monument. He showed us in the position that her body was laying. He, himself, got on the ground and showed us after 'ripping or tearing', as he described it, a portion of her pants, he showed us the position that he placed his own self on the ground; and at that time the unnatural act taken place.

"He then led us to a large hole in the fence. I think this fence possibly stood about six feet high. The hole was in the center, and it was a good, large hole, and at the top of the fence there was barbed wire. He showed us how he went through the hole. . . . (H)e carried us to a little house that is called a mausoleum and told us that that is where he placed the body.

"After leaving there, he carried us to a piece of shrubbery . . . where he had thrown, I believe, her pocketbook . . . or other effects that belonged to her . . ." Transcript, pp. 235-6.

right to remain silent and warned that any statement which he made could be used for or against him in a court of law, and he was informed of his right to counsel. The written confession also contained an admission that it was made freely and voluntarily.

13. On October 7 Dr. J. S. Nathaniel Tross, a member of the colored race and Davis' former pastor, came to see Davis after reading an account of the confession in a local newspaper. Dr. Tross conferred with Davis privately. Davis told him that he had not been mistreated in the city jail; that everyone was kind and courteous to him; that [fol. 365] he was properly fed, and that his statements, written and oral, and his reenactment of the crime, were voluntarily made. Davis further stated that he was moved by the prayer of Lieutenant Sykes to make the statement concerning the death of Mrs. Cooper.

The forgoing account of the external events and circumstances surrounding the confession contitute the background against which it must be appraised.

The test of the admissibility of a confession is whether "the confession is made freely, voluntarily, and without compulsion of any sort." Wilson v. United States, 1896, 162 U.S. 614, 623, 16 S.Ct. 895, 899. The question in each case is whether the will of the accused is so overborne at the time of the confession that his statement is not the product of a rational intellect and a free will. Reck v. Pate, 1961, 367 U.S. 433, 440, 81 S.Ct. 1541, 1546; Lynumn v. Illinois, 1963, — U.S. —, 83 S.Ct. 917, 920. This question is to be answered with complete disregard of the truth or falsity of the statement. Rogers v. Richmond, 1961, 365 U.S. 534, 81 S. Ct. 735.

As was said in Haynes v. State of Washington, 1963, — U.S. —, 83 S.Ct. 1336, 1344, "The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly * * * where it is necessary to make fine judgments as to the effect of psychological coercive pressures and inducements on the mind and will of an accused."

The concept of "voluntariness" has a two-fold aspect—the internal state of mind of the accused, and its effect when tested by legal standards. In determining the issue of voluntariness it becomes necessary, first, to re-create the

[fol. 366] mental state of the accused by inferences drawn from the historical facts in order to determine how he reacted to the events and occurrences surrounding the confession; and, second, to apply the proper legal standards to the particular mental state thus recreated in order to determine the legal significance of how the accused reacted.[7]

The historical facts found in this case disclose that Davis is not a youthful, inexperienced, mentally defective or impressionable defendant, but on the contrary is an adult of mature years who has been convicted of several serious felonies and has been in prison almost continuously for the past sixteen years. At the time of his arrest as an escapee he was currently serving a 17 to 25 years sentence for robbery and assault with intent to commit rape.

He had had extensive experience with police procedures and was accustomed to prison confinement. His arrest and imprisonment as an escapee did not result in sudden separation from family and friends. His status as an arrested escapee distinguishes him from the ordinary suspect confined for interrogation and investigation. He was provided the customary food and accommodation supplied other prisoners. Considering his inactivity during the sixteen-day period, it cannot be said that the food was inadequate to sustain him.

Although Davis was interrogated daily, the questioning was not prolonged nor was it conducted by relays of officers.[8] [fol. 367] On the contrary, only five officers questioned him prior to October 6, and the Cooper case was not mentioned until October 3. On the day of the confession Davis had been questioned approximately 15 minutes when Lieutenant Sykes offered his prayer. The prayer resulted from Davis' request and not from preconceived design. It was a simple supplication and, although Davis stated he was moved by the prayer, it cannot be inferred under all the circumstances

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[7] See the discussion in Part IV of the opinion of Justice Frankfurter in Culombe v. Connecticut, 1961, 367 U.S. 568, 603, 81 S.Ct. 1960, 1879.

[8] Compare Turner v. Pennsylvania, 1949, 338 U.S. 62, 69 S.Ct. 1352.

that the prayer acted upon his religious hopes and fears so that the confession was the product of psychological coercion.

It is a significant fact that, on the day following the confession, Davis told his former pastor during a private conference that he had been well-treated and that his confession was voluntary.

The Court concludes from the totality of circumstances in this case that the confession was the product of a rational intellect and a free will, and hence not involuntary or obtained in violation of due process.

The application for a writ of habeas corpus is hereby denied.

This 6th day of September, 1963.

Algernon L. Butler, Chief Judge, U.S. District Court.

[fol. 368] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9256

ELMER DAVIS, JR., Appellant,

versus

STATE OF NORTH CAROLINA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. ALGERNON L. BUTLER, DISTRICT JUDGE.

Argued April 29, 1964

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BELL, Circuit Judges. By consent, resubmitted before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and BELL, Circuit Judges, en banc, without additional argument.

W. B. Nivens and Charles V. Bell for Appellant, and James F. Bullock, Assistant Attorney General of North Carolina, (T. W. Bruton, Attorney General of North Carolina, on brief) for Appellee.

[fol. 369] OPINION—December 8, 1964

HAYNSWORTH, Circuit Judge:

The case of Elmer Davis, Jr., convicted in North Carolina of rape-murder, is again before this Court. This time it comes on appeal from the denial of a writ of habeas corpus after a full evidentiary hearing in the District Court, and the resolution by that Court of the historical facts based upon evidence taken before the Court and the prior record in the state court. Since the Court's ultimate conclusion was warranted by its findings and the findings are supported by evidence, we affirm denial of the writ.

Elmer Davis, Jr. was tried and convicted in the Superior Court of Mecklenburg County, North Carolina of the rape-murder of an elderly woman, Mrs. Foy Bell Cooper.

During the trial, a written confession was offered and received in evidence against him, as was testimony of his re-enactment of the crime, after the Court had heard evidence as to its voluntary character and had found the confession voluntary and admissible. The jury must also have found the confession voluntary, for it was told by the Court that reasonable doubt of guilt would follow from reasonable doubt that the confession was voluntary.

On appeal to the Supreme Court of North Carolina, the conviction was affirmed.[1] The Supreme Court of the United States denied a petition for a writ of certiorari.[2]

Thereafter, Davis filed a petition for a writ of habeas corpus in the District Court, which was denied after a [fol. 370] hearing during which the District Court reviewed the state court record.[3] On appeal we reversed, a majority of the Court holding that the general finding in the state court that the confession was voluntary was not a resolution of the historical facts which the habeas corpus court could accept. We held that the parties should be afforded another opportunity to present directly to the District Court evidence bearing upon the question whether the confession was voluntary or the product of coercion.[4]

Pursuant to our mandate a full evidentiary hearing was held in the District Court, following which the District Judge made detailed findings of fact and concluded that the confession was voluntary.[5] From that conclusion, it follows that receipt in evidence of the confession by the state court was not an infringement of any constitutional right of the defendant.

Davis has again appealed.

The historical facts, as found by the District Court, may be briefly summarized here. The factual disputes underlying the ultimate issue are more fully detailed in the earlier opinions of this Court and in those of the District Court and of the Supreme Court of North Carolina.

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[1] State v. Davis, 253 N.C. 86, 116 S.E. 2d 365.

[2] Davis v. North Carolina, 365 U.S. 855, 81 S.Ct. 816, 5 L.Ed. 2d 818.

[3] Davis v. North Carolina, E.D.N.C., 196 F.Supp. 488.

[4] Davis v. State of North Carolina, 4 Cir., 310 F.2d 904.

[5] Davis v. North Carolina, E.D.N.C., 221 F. Supp. 494.

Shortly before September 20, 1959, Davis escaped from a North Carolina prison camp. With a prior record of other [fol. 371] offenses, he had been sentenced to seventeen to twenty-five years imprisonment upon his conviction of robbery and of assault with intent to commit rape. Those offenses had been committed within a few blocks of Elmwood Cemetery in Charlotte, North Carolina, where Mrs. Cooper was murdered on September 20, 1959 while being sexually attacked.

The day after the Cooper murder, Davis was arrested in Belmont, North Carolina, some twelve miles from Charlotte. He was not in his prison uniform, but was clad in civilian clothes. He had in his possession women's undergarments and a billfold containing identification papers of one Bishel Buren Hayes. Hayes later testified that, on September 20, 1959, the billfold and his shoes were removed from his person while he lay in a drunken sleep near the boundary of a railroad right-of-way and Elmwood Cemetery in Charlotte.

When Charlotte police officials learned of the arrest of Davis, they thought he might be a suspect in the Cooper murder. They thought so because of the fact that Davis had previously been convicted of a similar assault in the vicinity of Elmwood Cemetery. They requested and received permision of the warden of the state prison to lodge him in the Charlotte City Jail and to keep him temporarily in their custody.

Davis was held in the Charlotte City Jail for sixteen days, except for a day and a night when he was held in Asheville and its vicinity. The District Court has found that during those sixteen days he was adequately fed and properly treated. He was not abused physically. He was not threatened or intimidated. He had access to a shower bath which he used. He was questioned from time to time, [fol. 372] but not lengthily or overbearingly. Until the last few days, the questioning was about his possession of the articles he had with him when arrested and the clothing that he wore. He told the officers he had obtained them in the course of break-ins he had committed in the vicinity of Asheville, North Carolina, and the officers undertook to confirm his stories. They were unable to do so, even though on October 1-2 they finally took Davis with them

into the mountains near Asheville, where he had promised that he would point out the scenes of his thefts. He was unable to identify them, and his reports of thefts in the mountains remained unverified.

On the afternoon of October 3, 1959, the Cooper case was mentioned to Davis for the first time. He denied knowledge of it. It was again mentioned to Davis on October 5 when he again denied complicity in the crime and stated that he had been in Belmont on September 20. On October 6 Davis was again questioned about the Cooper case. Davis expressed the wish to speak to one of the officers alone. He had known that officer earlier. When the two were alone, the officer referred to Davis's use of a Bible which he was carrying in his hand. Upon inquiry Davis told him that he had been reading the Bible, but had not been praying for he did not know how to pray. He agreed that he would like the officer to pray for him.[8] Thereupon, the officer offered the following prayer:

> [fol. 373] "O God, You are now a witness to and the watcher over both of us. I have been asked to pray. I want You to be with me in this prayer. I want You to watch over the person that is present with me; also be with me. I do not only ask prayers for myself, I ask for You to be with all people."

Following the officer's prayer, Davis told the officer of the attack upon Mrs. Cooper and the disposition of her body. Later, in the cemetery, he re-enacted the crime, pointing out the place where it had occurred, the opening in the fence through which he removed her body, and the place where he hid it. He also recovered his prison shoes in the bushes where he had concealed them near the ceme-

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[8] The District Court found that the request of prayer originated with Davis. The prayer internally and the testimony in the state court record support the finding, though the officer's testimony at the habeas corpus hearing indicates that it originated with him, that is, that he asked Davis if Davis would like for him to pray after Davis had told him that Davis did not know how. Whether or not the suggestion originated with Davis, however, it is perfectly clear that he assented.

tery. Still later, he repeated the entire confession before other officers and signed a typewritten version of it after it had been prepared.

In this Court, Davis attacks the denial of the writ primarily upon the basis of his version of the facts. He presents the case as if from the outset he had been questioned for long and exhausting periods by relays of officers about the Cooper murder, was beaten,[7] threatened, intimidated, furnished insufficient food and denied access to a shower bath. Davis, indeed, made such contentions, but they are now foreclosed by the findings of the District Court, which have abundant support in the record. Findings not clearly erroneous are binding upon us here and may not be disregarded as Davis would have us do.

[fol. 374] Indeed, the evidentiary support of these findings is overwhelming, with the exception of that for the ultimate finding that his feeding was adequate, and the support of that finding is sufficient.

The Charlotte City Jail has no kitchen. From its own facilities it supplied its prisoners with such things as coffee, but it imported the solid foods for their sustenance. It routinely ordered from outside suppliers two sandwiches per meal per prisoner. Each prisoner was entitled to his two, and, since some wished only one, more than two were frequently available to those prisoners whose appetites were so great. The routine fare was cold, and on one occasion Davis expressed a wish for hot hamburgers instead of cold sandwiches. Two hot hamburgers and a glass of milk were procured for him. When he went with the officers to Asheville to show them the scenes of his claimed thefts, he had two hot meals, one in the home of one of the officers. Davis, himself, testified that when he requested such things as peanuts and cigarettes they were supplied. There was testimony that his requests for peanuts, soft drinks and similar food were rewarded not because of any indication of particular hunger, but out of suggestion of particular taste.

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[7] There were a number of variations in his testimony in the habeas corpus court as contrasted with his testimony in the state court. In the habeas corpus court, for instance, he testified he was slapped and "smacked," but his testimony in the state court, though covering in detail other contentions he makes, contains no such claim.

This evidence adequately supports the finding that the confession was not the product of hunger. The meals that Davis had in and out of the Charlotte City Jail were not so deficient as to require a finding that denial of an unexpressed wish for the prison fare of the county jail was coercive.

While the prisoner's principal attack is in disregard of the well-supported findings of fact, there are questions which lurk in the case which require our consideration. [fol. 375] A question arises out of the fact that his arrest sheet in the Charlotte City Jail bore a notation that he was not to be allowed to use the telephone, and that no one was to be allowed to see him. Using that as a very substantial launching platform, Davis contends that he was held incommunicado and that attempts to contact counsel through his sister were frustrated by the police.

The District Judge found as a fact, however, that the notation on the arrest sheet was disregarded, and this finding has evidentiary support. During his confinement in Charlotte, Davis sought to see no one other than a sister, whom he had not seen for some twelve years. He did seek to contact her, and one of the officers assisted him when he encountered difficulty in locating her in the telephone directory. Even with that assistance, however, he was unable to ascertain her telephone number, so the officers, themselves, went in search of the sister. They found her and told her that her brother was in the jail and wished her to come to see him. She responded that she would go to see him when she could, but she could not then leave her children.

The sister testified in the habeas corpus hearing that she twice went to see her brother in the Charlotte City Jail, but each time was turned away. The District Judge did not believe her, finding, as the officers testified, that neither she nor anyone else was turned away. Their testimony is the more readily believable in light of the fact that one of them had undertaken to assist the prisoner in his efforts to contact the sister by telephone, and, that failing, others personally conveyed his message to her. Surely they would not have gone to such length to convey to the sister the request that she go to see her brother if they intended to deny her access to him.

[fol. 376] There was also testimony that Davis had been informed by the police officers of his right to counsel.[8] Davis made no request for legal assistance. Indeed, even after seeing his sister, he let three months go by before undertaking to contact an attorney.

This case is, therefore, far from the principal of Escobedo v. Illinois, 378 U.S. 478. In Escobedo, a suspect, not otherwise lawfully subject to detention, was being interrogated. During the course of his questioning he repeatedly asked permission to consult his lawyer, and his lawyer was present in police headquarters, insistently demanding access to his client. One time, through opening doors, the lawyer and client actually got a glimpse of each other, but their persistent demands and requests to consult were as persistently refused until after a confession had been obtained. The Supreme Court held, of course, that the suspect should have been allowed to speak to his lawyer who was present for that purpose and who was actively asking, himself, to speak to his client. Denial of the right to consult his attorney was held, under those circumstances, to have been a denial of due process.

Here, we have no such circumstances. Davis, advised that he could consult an attorney if he wished, sought only to have his sister come to see him. The police did all that they could to assist him in the realization of that wish. When there was no request of legal assistance and when the police did all that reasonably might be expected of them to facilitate the prisoner's seeing the one person he wished to see, it cannot be held that the police unreasonably deprived him of his right to counsel.

[fol. 377] The notation on the arrest record creates suspicions in one's mind, but such suspicions cannot overcome the positive evidence that the notation had no practical effect or influence upon what was done and that help rather than hindrance was offered to him in his one effort to contact someone outside the prison walls. The District Court's acceptance of such testimony and its findings based upon it make the principal of Escobedo completely irrelevant to

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[8] They also informed him of other rights, such as his right to remain silent, so the officers testified and the District Court found.

this case. Haynes v. Washington, 373 U.S. 503, is equally inapposite.

If the prayer which was said before Davis unburdened himself with the details of his crime was not so innocuous, it would give us concern. Whether, however, the idea of the prayer originated with Davis or with the officer, it was so bland that it cannot be said to have been coercive.

Religious influence and religious exhortation preceding a confession have been thought not only unobjectionable but indicative of the trustworthiness of the confession. Wigmore emphatically declares that since a contrary suggestion in an English case of 1823, religious exhortations have never "been regarded as vitiating a confession."[9]

There is an interesting note written by a clergyman-law student in 1 Washburn Law Journal 415 on the role of the clergyman in the coerced confession. The author of that note agrees with Wigmore that the cases have not held confessions to be the product of intimidation though extracted by a clergyman's invocation of the terrors of an eternal Hell if the Lord's forgiveness is not sought and obtained on the basis of a complete confession. The author thinks that such confessions should be recognized as having been [fol. 378] coerced, and, perhaps, they may be now that it is recognized that coerced confessions are to be excluded from evidence however trustworthy they may appear to be.[10]

Here, however, the police officer was not the prisoner's religious or spiritual adviser, and the little prayer invoking God's blessing upon the two of them contained no hint of Divine punishment or suggestion of the cleansing power of confession. Davis appreciated the prayer, and the next day he told Dr. J. S. Nathaniel Tross, a Negro minister who had served a congregation of which Davis and his family had formerly been members, that he had been moved by the prayer to make the confession. At the same time, he told Dr. Tross, however, that he had been treated well and with kindness, that he had been properly fed and not mistreated in any way, and that the statement he had made was entirely voluntary. He seems to have been saying that

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[9] 3 Wigmore on Evidence, 3d ed. 1940 § 840.

[10] Rogers v. Richmond, 365 U.S. 534.

the statement was the product of kindness and considerate treatment, of which the prayer was an outstanding example.

While the prayer may have moved him to speak, we cannot say, in disregard of the District Court's findings, that it overcame his will. If prayer or other religious influences are to be held coercive so as to require the exclusion of a subsequent confession, the religious references, themselves, ought to be designed or calculated to so arouse the prisoner's fears of a divine judgment as to overcome his resistance to present confession. The prayer here was not so designed, and nothing in it can be said to be reasonably calculated to have that result.[11]

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[11] The author of the note in the Washburn Law Journal, mentioned above, suggests only that religious exhortations by clergymen should be suspect and then only when the clergyman's apparent purpose is the production of a confession, even though the clergyman may sincerely believe that a confession is essential to Divine forgiveness and ultimate salvation of the prisoner's soul. When there has been a prior relationship between the clergyman and the prisoner, justifying the conclusion that the prisoner looks upon the clergyman as his spiritual adviser, such religious exhortations may be all the more coercive. Here, of course, there was nothing to indicate that Davis looked upon the policeman as his spiritual adviser, and there is nothing else to indicate that the bland little prayer was calculated to break down his resistance. The very fact that he asked to be allowed to talk to that officer alone indicates a pre-existing personal confidence, but not a religious one, and a readiness to confide in that one officer things he had been unwilling to tell others.

The circumstances here are in strong contrast to the calculated use of religious doctrines to extract a confession disclosed in the cases discussed in the Washburn Law Journal note and suggested in the opinion of the Supreme Court in United States v. Carignan, 342 U.S. 36, 40. The Carignan opinion, at least, leaves open the possibility that aggravated use of religious influence for the purpose of extracting a confession may be held to be coercive; it does not suggest that in this unaggravated situation, this Court may disregard the District Court's finding that the prayer was not coercive.

[fol. 379] The contention which Davis advances that his detention became illegal when he was not earlier charged with the Cooper murder is quite unfounded.

Unreasonable delay in the arraignment of a federal prisoner charged with a federal crime is prohibited.[12] The genesis of the prohibition was not in the Constitution, however, but in the supervisory power of the Supreme Court over the administration of justice in the federal courts. This, the Court made plain when it announced the rule in McNabb, and subsequently demonstrated in holding that the McNabb rule is inapplicable to criminal prosecu-[fol. 380] tions in the state courts.[13] The due process clause of the Fourteenth Amendment prohibits a state's use of a coerced confession, but when the habeas corpus court considers a state court conviction, unreasonable delay in arraignment does not provide a mechanical answer. Such unreasonable delay is only one circumstance which, with all others, ought to be considered in arriving at an ultimate finding as to whether or not the confession was voluntary.

Davis's case is not helped by the fact that North Carolina law also requires arraignment of state prisoners without unreasonable delay. If that requirement of state law was violated, it might give rise to state remedies, but it does not constitute a basis for habeas corpus relief in the federal courts.[14] The Fourteenth Amendment imposes minimal standards for state criminal procedures. It does not prohibit a state from adopting more protective procedures and, when one does, strict compliance with the more fulsome state-created right does not become a matter of federal right or subject to protection in the federal courts.

More importantly, there was here no unreasonable delay in the arraignment. There was no violation of the state requirement or of the spirit of the McNabb rule.

Davis was not taken into custody because he was suspected of having murdered Mrs. Cooper. He was arrested by the Belmont police because he was an escaped convict. Thereafter he was at all times held by the authorities under

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[12] McNabb v. United States, 318 U.S. 332.

[13] Brown v. Allen, 344 U.S. 443; Gallegos v. Nebraska, 342 U.S. 55.

[14] Lyons v. Oklahoma, 322 U.S. 596.

the judgment of conviction for assault upon which he was [fol. 381] being held at the time of his escape. The immediate custody of the Charlotte police, with permission of the State Warden, was, in law, that of the Warden.[15] Clearly, Davis was not entitled to bail or to be released upon any terms or under any circumstances. His detention, therefore, during the investigation of the Cooper case was entirely lawful.

This has been clearly held in a number of cases.[16] A convicted felon lawfully detained under a valid judgment is not immune from investigation of other crimes, and, when he becomes suspected of possible implication in other crimes than those for which he has already been convicted, he does not become entitled to release. No rule of law forecloses reasonable interrogation of such a prisoner, though the interrogation is concerned with other possible crimes, so long as the interrogation, itself, is not so unreasonably pursued as to become coercive.

Here, the police officers had no probable cause to charge Davis with the murder of Mrs. Cooper until he confessed it. Neither the spirit of the McNabb rule nor the North Carolina law requires that he be charged with a crime without probable cause to support the charge. When they had probable cause to charge him with the murder of Mrs. Cooper, they did so. Under either rule, the beginning of the running of the time for arraignment could not be earlier than the discovery of probable cause for preferring the charge. [fol. 382] When the prisoner is lawfully detained under some other charge, or, as here, under a previous conviction, his confinement is not made unlawful because he is suspected of having committed another crime under prolonged investigation.

Finally, it may be suggested that Davis should have been delivered promptly by the Charlotte police into the immediate custody of the State Warden, where he could mingle with a large, general prison population and where he would be not so readily available to detectives investigating the

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[15] Tyler v. United States, D.C. Cir., 193 F.2d 24.

[16] United States v. Carignan, 342 U.S. 36; Rademacher v. United States, 5 Cir., 285 F.2d 100; Pependrea v. United States, 9 Cir., 275 F.2d 325.

Cooper murder. The convicted prisoner, however, has no right to determine the place or the circumstances of his confinement or to complain that arrangements for his custody are made with regard for the convenience of officers investigating other crimes. So long as the circumstances of his actual confinement cannot be said to have been coercive, and they reasonably have been found not to have been so here, they do not become coercive because someone may now think the prisoner would have been happier, or less likely to have confessed, had he been placed in the general population of a large prison at some other location.

There have been isolated attacks upon the legality of custody by officers investigating some other crime than the one upon which the prisoner was then lawfully held in confinement, but they have been unavailing. Thus, where a prisoner, lawfully held after arraignment upon charges of robbery and assault, was delivered into the custody of detectives investigating a murder, his custody by the detectives was held to be lawful.[17] Another prisoner who had [fol. 383] been confined in the federal penitentiary at Danbury, Connecticut, was transferred under a writ of habeas corpus ad testificandum to the House of Detention in New York, where he, subsequently, confessed the commission of another crime. He attacked his confession, claiming, among other things, "that detention in the New York House of Detention was much more unpleasant than in Danbury," but that circumstances did not vitiate the confession.[18]

Prisoners may, and undoubtedly do, have preferences between prisons and other penal institutions. The fact that one would have preferred to have been confined elsewhere, however, has not yet been held to have been a basis of exclusion of a confession made by him of his complicity in some other crime. The circumstances of his actual confinement at the time of his confession and during the preceding period of interrogation and investigation are highly relevant, of course, but, if they are not in themselves coercive and the confession is otherwise voluntary, there is no basis for the application of an exclusionary rule.

Here, as we noted at the outset, the District Judge has

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[17] Tyler v. United States, D.C. Cir., 193 F.2d 24.

[18] United States v. Gottfried, 2 Cir., 165 F.2d 360.

found that the confession by Davis of the Cooper murder was voluntary. His ultimate finding is supported by subsidiary findings, and they, in turn, are quite adequately supported both by the evidence taken before him in the habeas corpus hearing and by the evidence taken in the state trial which resulted in the murder conviction. Upon the basis of those findings, the District Court quite properly concluded there was no constitutional infirmity in the state trial and the conviction was not in violation of any constitutional right.

[fol. 384] We conclude that the District Judge properly denied the writ.

There remains a moral question as to whether one of Davis's mentality should be executed or whether his sentence should be commuted to life imprisonment. That is a matter of executive clemency, and the courts are powerless to prescribe the answer. The possibility of any such relief can be explored only with North Carolina's Governor.

Affirmed.

SOBELOFF, Chief Judge, with whom BELL, Circuit Judge, joins, dissenting:

Perhaps the most recalcitrant problem to engage the attention of courts in the area of law enforcement stems from the inveterate police practice of pressing for confessions behind closed doors where the accused is without access to legal guidance. That such inquisitions involve elements of coercion has long been recognized. Correction has been impeded by the inherent difficulty of ascertaining the truth between the possibly false or exaggerated claims of the accused and the customary unanimous denials of the police who in the circumstances can be the only witnesses.

In recent years courts have come to realize with ever increasing clarity that the practice often presents more than debatable issues of coercion. It is now established on the highest authority that "when the process has shifted from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession," the accused must be permitted to consult with a lawyer. This is the requirement of the Sixth Amendment to the Con- [fol. 385] stitution of the United States as made obligatory upon the states by the Fourteenth. Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

I

As the majority opinion recites, when Davis, a prison escapee, was arrested in Belmont, North Carolina, on September 21, 1959, the Charlotte police "received permission of the warden of the state prison to lodge him in the Charlotte city jail and to keep him temporarily in their custody." The opinion also states, correctly, that the Charlotte police sought the custody of Davis because "they thought he might be a suspect in the Cooper murder case."

From the outset, the authorities did not put him in the jail customarily used for lengthy detention of persons awaiting trial, where suitable kitchen, bathing and other facilities are afforded, but lodged him in a lockup in Detective Headquarters across the street, which is habitually used for brief, overnight detentions only. Unusual too, and highly indicative of the purpose of the police in pursuing this course, is the specific notation made on the arrest

sheet: "Do not allow anyone to see Davis, or allow him to use telephone."

Some of the ensuing events are in dispute, but others are incontestable. Certain it is that not until the defendant had remained in solitary confinement for 16 days did he confess. The testimony is in conflict as to details, such as the extent and continuity of the questioning, the claims of threats, beatings, scantiness of food, etc. Such contradictions are inevitable. In many cases the fact finder may [fol. 386] stifle his doubts by adopting a merely quantitative measure in appraising the testimony. He may accept the denials of the police who outnumbered the lone accused in the station house and on the witness stand, and may reject the prisoner's claims. Yet because of the very nature of the dispute the fact finder cannot be quite sure.

In the present case, however, certain powerful objective facts remain untouched even by the sweeping denials of the officers. First is their plainly manifested purpose, indeed avowed by them on the arrest sheet, to enforce absolute and interrupted seclusion during the interrogation. This ineluctable piece of evidence remains undenied and undeniable. It dominates the record and challenges the police version more eloquently and more conclusively than any oral testimony. The instruction not to permit anyone access to Davis and not to allow him to communicate with the outside world can mean only that it was the determination of his custodians to keep him under absolute control where they could subject him to questioning at will in the manner and to the extent they saw fit, until he would confess. To achieve their goal they made sure that he would not have the means of asserting his constitutional right to consult counsel and of exercising his constitutional right not to incriminate himself. The circumstances were at best calculated to weaken his will and to permit the prisoner no support from counsel or friend. The historic fact is that he did not break until the sixteenth day of confinement. Only after he had confessed was the isolation terminated.

Rarely do police officials make a written declaration, as they did here, of a design to deny their prisoner's right to [fol. 387] counsel and his other constitutional rights.[1] This

[1] When it came to the attention of the Supreme Court, it sharply criticized a practice substantially identical to the

undisputed fact is sufficient to invalidate the confession irrespective of the District Court's resolution of any disputed issues of fact.

We turn first to the violation of the right to counsel as ground for the exclusion of the resulting confession.

II

On the uncontroverted facts, the principle of Escobedo v. Illinois, 374 U.S. 478 (1964), is applicable. In that case, the Supreme Court formulated its holding in two separate statements. The first was:

> "[W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amend-[fol. 388] ment,' Gideon v. Wainwright, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The Court says in summation:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and under the

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one here in question. Haynes v. Washington, 373 U.S. 503, 505 (1963). There, Haynes admitted participation in a recently committed robbery. Instead of charging him with the crime, the police booked him for "investigation" and placed him on the "small book." Prisoners so booked were not permitted to make phone calls or have any visitors. The Court condemned this practice.

circumstances here, the accused must be permitted to consult with his lawyer."

Thus Escobedo announced no new constitutional right, but indicated circumstances in which the right to counsel, previously announced in Gideon v. Wainwright, 372 U.S. 335 (1963), would be available.

The Supreme Court's holding in Escobedo was explicitly based upon its earlier teachings in Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963); and Massiah v. United States, 377 U.S. 201 (1964), that under the Constitution a state criminal defendant is entitled to the "guiding hand of counsel" when a critical stage in the proceedings has been reached. The doctrinal importance of Escobedo is found in its recognition that the interrogation of a suspect in police custody is a critical juncture in the criminal process, and that the inquisition may not be persisted in without according him the right to counsel. Otherwise, the real trial occurs in the police station, and the trial in court is:

> [fol. 389] "no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial is a very hollow thing when for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U.S. 330, 344 (Black, J. dissenting)" quoted in Escobedo at pp. 487-88.

Today's opinion would limit Escobedo to its precise facts and in so doing loses sight of the basic doctrine of that case.

The majority would codify into a rigid formula the particularities of Escobedo, namely, that a lawyer has been previously employed, is present in the station house, peers through a glass door and makes futile efforts to signal his client who is then being spirited out of sight. It is inconceivable that the Court meant to make the Escobedo doctrine available only in cases with features which are its exact carbon copy. It is true that the Court used the qualifying phrase "under the circumstances here." This should not be read as the equivalent of "*only* under the circumstances here."

It is as illogical to exclude from the operation of the Escobedo doctrine all but the very circumstances of that

case, disregarding cases presenting analogous circumstances, as it would be to embrace within its doctrine, indiscriminately, all cases irrespective of circumstances. We have here no borderline case where the police may fairly claim some latitude in questioning a person whose status is still obscure. Davis was definitely the suspect when he was arrested and sealed off in the special lockup. From then on the officers' concentrated effort was to draw out of his own mouth words that would perfect the case against him. Apart from any physical mistreatment or threats, which are charged but denied, questioning him and keeping him out of the way of any possible help from lawyer or friend from September 21 to October 6 was a bald violation of his rights.

Nor is there any force in the argument that Davis, according to the credited testimony of the police, did not ask for a lawyer. It has been adjudicated that the failure to demand counsel at other critical points works no forfeiture of the right. Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Carnley v. Cochran, 369 U.S. 506, 513 (1962); Hamilton v. Alabama, 368 U.S. 52 (1961). Neither should the right be lost for failure to assert it when the accused is subjected to interrogations in the police station. Escobedo does not make it necessary under all circumstances for the person in custody to ask to see a lawyer. It happens that Escobedo did make such a request. The District Judge here has accepted testimony of the police that Davis did not specifically request counsel. For present purposes it is unnecessary to challenge the finding.

Moreover, when police have gone to the length of giving written instructions that the prisoner is not to be allowed to be seen by anyone or to use the telephone, it is fantastic to insist that he should have formally requested a lawyer. Much good it would have done him! Since the order had been issued to deny Davis all contact with the outside, it would be naive to think that the police behaved toward him in such a way as to leave him under the impression that a request for counsel would be honored.

But the finding as to whether or not Davis did in fact make such a request is unimportant. The point was under- [fol. 391] scored by the California Supreme Court in People

v. Durado, 33 U.S.L. Week 2122 (Cal. Sept. 15, 1964), which held applicable the rule announced in Escobedo, irrespective of whether or not the defendant has actually requested counsel.

> "We find no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one; whether or not the point of necessary protection for guidance of counsel has been reached. * * * We should not penalize the defendant who, not understanding his legal rights, does not make the formal request and by such failure demonstrates his helplessness."[2]

It is also true that Escobedo had employed a lawyer who was not permitted to speak to him during the police interrogation. Davis had no lawyer and the police made sure that he should have none while they worked to get his confession. The factual distinctions between the two cases seem immaterial. Indeed, in their totality, the circumstances here are more aggravated than in Escobedo.

It was found by the District Court, in accordance with the police testimony, that at the time of the *written* confession the defendant was advised of his right to remain silent and warned that the statement which he was asked to sign could be used "for or against" him in a court of law and that he was informed of his right to counsel. Ac-
[fol. 392] cepting the finding, one may ask, of what earthly use was it, having kept this man incommunicado for 16 days until after he had made an oral confession, to tell him only then of his constitutional right to maintain silence? At that stage the police were merely going through the mechanics of getting evidence in writing of the previously obtained oral confession. Cautioning the prisoner then was utterly ineffective and can import validity to neither the oral nor the written confessions. The court should dis-

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[2] A trial judge of the New York Supreme Court, Queens County, has held Escobedo to be applicable only where the prisoner has requested and been denied the assistance of counsel. People v. Agar, 33 U.S.L. Week 2247 (N.Y. Nov. 12, 1964).

regard this hollow gesture designed to legitimate the illegal proceedings.

Because the Supreme Court's decision in Escobedo came after Davis' state trial and after the District Court's habeas corpus hearing, a question may be raised as to its retroactive application.[3] But Escobedo is merely a particularization of the right to counsel declared in Gideon. While the Supreme Court has not yet expressly declared Gideon to be retroactive, in Escobedo itself, it so applied the Gideon rule. Other federal and state courts have held Gideon to be retroactive.[4] Since Gideon has been given retroactive application so should Escobedo.

[fol. 393] For all of these reasons, and upon the very findings of the District Court, Davis' confession should have been rejected as having been obtained in violation of his right to counsel. Any use of the confession was prohibited irrespective of questions of voluntariness, and its admission into evidence requires reversal. However, because the record also shows that the confession was the product of the persistent coercive efforts of the police to obtain an acknowledgment of guilt, there is an additional reason for its exclusion. This further reason will be considered next.

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[3] See Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 Va. L. Rev. 1115 (1964), who suggests that because the writ of habeas corpus tests whether the petitioner is presently detained in violation of the Constitution, there is no issue of retroactivity, and the habeas court must apply the Constitution as presently construed. The legality of the detention in the past, he suggests, is not, therefore, the determinative consideration.

[4] United States ex rel. Durocher v. La Vallee, 330 F.2d 303 (2d Cir. 1964), *cert. denied*, 377 U.S. 998 (1964); Palumbo v. State of New Jersey, 334 F.2d 524 (3d Cir. 1964); and in this Circuit see Jones v. Cunningham, 319 F.2d 1, 4 (1963) (concurring opinion). The Michigan and Pennsylvania Supreme Courts have so held in In re Palmer, 371 Mich. 656, 124 N.W. 2d 773 (1963), and McCray v. Rundle, 415 Pa. 65, 202 A.2d. 303 (1964).

III

In dealing with the issue of voluntariness of the confession, the court entertains too narrow a concept of the scope of appellate review. It accepts as virtually unreviewable findings of fact what in reality are erroneous conclusions of law. Also it too readily defers to findings that are clearly erroneous. Closer scrutiny discloses that some of the findings are without sufficient evidentiary support, being refuted by undisputed facts which the lower court has either overlooked or failed to accord proper weight. If this court were to analyze the findings and recognize their true nature, it could not hold the confession voluntary.

With all respect for the District Court, the conclusion is inescapable that in this instance it has failed in its task of fact finding and has not applied the correct legal standard. It is true that the police version of events surrounding the detention contrasts with Davis' account. But here, the District Court, in upholding the police version, has either ignored or rejected uncontroverted evidence indicating the coerciveness of the circumstances of Davis' detention. Surprisingly, for example, its opinion makes no reference whatever to the uncontroverted fact of greatest significance—the [fol. 394] tell-tale notation on the police blotter, which directs that Davis be held incommunicado. When a finding rests upon testimony that is made utterly unworthy of credit by a predominant undisputed fact in the record, it is the duty of an appellate court to declare the finding clearly erroneous.

In relation to the place of detention chosen by the police, it is uncontradicted that the Charlotte city jail, where Davis was held, was an "overnight" jail, with extremely limited facilities. Highly suspect is the choice of this jail instead of the Mecklenburg County Jail, used for prisoners whose detention is to extend beyond a day or so. Coupling this with the admitted fact that from the time of Davis' arrest he was a suspect in the Cooper murder, it is too plain for doubt that the unusual place and duration of the detention and the strict secrecy were decided upon precisely because this best fitted the officers' plan to persist until they could draw a confession from the prisoner. Indeed, what other reason was there for not returning the defendant to the

prison from which he had escaped, or putting him in the Mecklenburg County Jail?

The District Court found that the police, at Davis' request, had contacted his sister and it also rejected the sister's testimony that she had been turned away from the police station on two occasions when she asked to see Davis. The court was free to treat each of these pieces of testimony as worthy or not worthy of belief. However, the objective fact that neither the sister nor anyone else saw Davis until after the confession is unchallenged. This uncontradicted fact, when considered in conjunction with the explicit directions on the police blotter, demonstrates the [fol. 395] error of the District Court's conclusion that Davis was not held incommunicado. If this does not constitute holding a man incommunicado, the word is meaningless.

At the habeas corpus hearing the police admitted conducting daily interrogations of Davis. They claimed, however, that in the first 12 days their questions concerned thefts and unlawful entries committed by him after his escape, and that they did not ask him about the Cooper murder till October 3. This is palpable camouflage. It is not humanly possible that, notwithstanding their extraordinary arrangements, including seclusion of their subject in the special lockup, they refrained for almost two weeks from asking him about the Cooper murder, but confined their questions to some petty thefts. This is what the police ask the court to believe, despite their testimony that the Cooper murder was the reason they sought the consent of the Director of Prisons to hold Davis. Their version is that they interrogated him on October 3, after they had taken him to the cemetery, the scene of the murder. Even if the police testimony on this point is accepted, the questioning on the last four days is not to be considered in isolation, for the constant interrogation on the preceding 12 days doubtless had a cumulative effect, and its clear purpose was to break the prisoner's alibi in the murder case and not primarily to solve the minor offenses. According to the police themselves, the commission of the murder was consistently denied by Davis. At noon on October 6, after persistent earlier denials of guilt, he refused to answer questions con-

cerning the death of Mrs. Cooper. But the questioning continued.

Thereupon a remarkable scene was enacted. A police lieutenant knelt in prayer with Davis. Whether it happened [fol. 396] upon Davis' initiative, as the District Court found, or at the officer's instigation, as he plainly testified at the habeas corpus hearing (see n. 6, majority opinion), is not important.

If, as the court acknowledges, a clergyman's religious exhortations are suspect when the apparent purpose is to produce a confession,[5] how gravely questionable, for a somewhat different reason, must be the pseudo religious ministrations of a policeman. Particularly is this so when he appears on the scene at the instance of the team of inquisitors that has engaged in repeated efforts to "break" the prisoner and his sole purpose is to clinch the case against the man in his custody.

Police solicitude for the defendant's spiritual welfare would be less suspect if the police, so eager to provide religious comfort to a man who "did not know how to pray," had sent for a minister then, instead of having a policeman play the role of minister. It is noteworthy that although the police lieutenant substituted for a minister in the preconfession prayer, the police had ready access to a minister *after* the confession, who visited the accused and obligingly returned with a purported endorsement from Davis of the "good treatment" accorded him at Headquarters.[5a]

The spectacle evoked by this record of the police officer and his prisoner uniting in prayer challenges the ingenuous- [fol. 397] ness of the entire process. We are told that after a short prayer was pronounced, followed by a period of silence, Davis admitted that he had killed the woman in the cemetery. Thus the officer's prayer, at least, was answered.

As the Attorney General of North Carolina would have

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[5] See Kruse, The Role of the Clergyman in the Coerced Confession, 1 Washburn L.J. 414 (1961).

[5a] The minister admitted on cross-examination that for many years he had "cooperated" with the police, that he had visited many prisoners, and on several occasions later gave testimony about his conversations with them.

it, nothing that the police had done in 16 days influenced the confession. A "bland," almost banal little prayer, recited by the lieutenant and his quarry worked a miracle of repentance and confession. Far more reasonable is the conclusion that the confession came in response to the pragmatic appeal addressed to Davis in his predicament by Lieutenant Sykes: "Davis, go in there and sign that paper so that you can get something to eat and get a hot bath." It requires no profound insight to understand that before the prayer incident occurred the long isolation and secret interrogation without the benefit of counsel had insidiously worked its destructive effect. The prayer was injected into evidence by the state to divert attention from the legally vulnerable process that really led to the confession. This was an attempt to present a plausible alternative cause in explanation of the confession.

In no case on record has a confession been upheld where the prisoner was accorded similar treatment over so protracted a period. The decided cases involved at most incommunicado detentions for a few hours or a few days.[6] The confession in the present case was not a voluntary act, [fol. 398] born of free will. It was the product of the massed efforts of some seven policemen against a single individual, constituting unlawful inducement and coercion. Haynes v. Washington, 373 U.S. 503, 519, (1963). This is far from announcing an absolute rule forbidding all questioning of suspects. It is enough to say here that keeping a person in a police lockup for more than two weeks without opportunity to get advice or help, for the purpose of questioning him, is fundamentally unfair. A confession obtained under such conditions may not be used against him.

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[6] The undisputed length of detention exceeds that in Turner v. Pennsylvania, 338 U.S. 62 (1949) (four nights and five days); or Fikes v. Alabama, 352 U.S. 191 (1957) (five nights and five days); or Reck v. Pate, 367 U.S. 433 (1961) (three nights and four days); or Culombe v. Connecticut, 367 U.S. 568 (1961) (four nights and five days); or Haynes v. Washington, 373 U.S. 503 (1963) (sixteen hours).

Davis' conviction was predicated upon the use of a confession obtained in breach of his constitutional rights in two respects—he was denied his right to counsel, and was subjected to a set of circumstances which were, in their totality, coercive. The conviction should not be permitted to stand.

[fol. 399] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9256

ELMER DAVIS, JR., Appellant,

vs.

STATE OF NORTH CAROLINA, Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina.

JUDGMENT—December 7, 1964

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

(Illegible) Haynsworth Jr., Chief Judge, Fourth Circuit.

[File endorsement omitted.]

[fol. 400] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1965

No. 37 Misc.

ELMER DAVIS, JR., Petitioner,

v.

NORTH CAROLINA

On petition for writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —December 13, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 815 and placed on the summary calendar.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

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No. 815

ELMER DAVIS, JR.,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

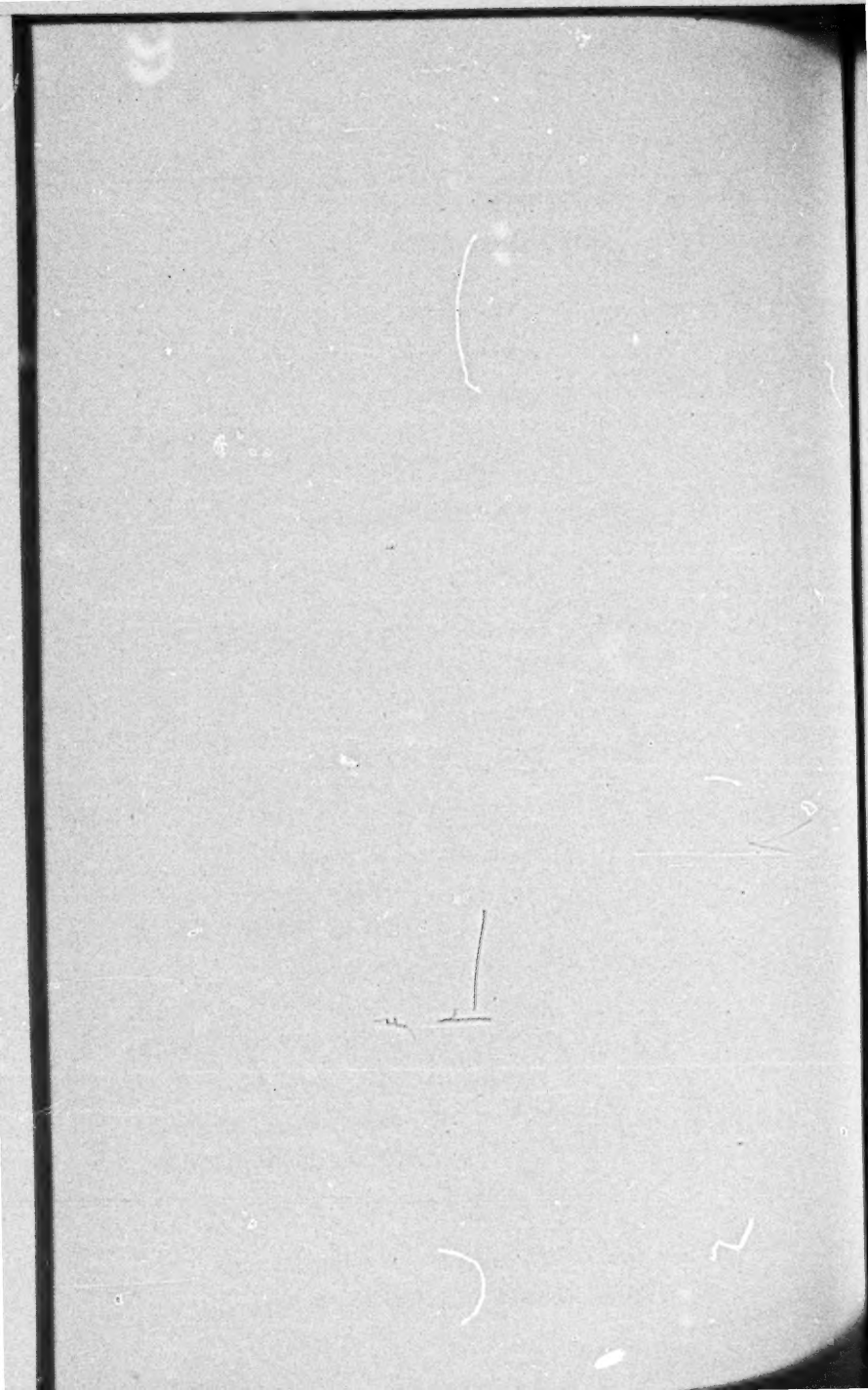
CHARLES V. BELL
112 South Irwin Avenue
Charlotte, North Carolina

WALTER B. NIVENS
235 South Brevard Street
Charlotte, North Carolina

CALVIN BROWN
235 South Brevard Street
Charlotte, North Carolina

Attorneys for Petitioner

PETITION FOR CERTIORARI FILED MARCH 8, 1965
CERTIORARI GRANTED DECEMBER 13, 1965



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On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—December 13, 1965.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 815 and placed on the summary calendar.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 815

ELMER DAVIS, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

Statement of the Case

Appellant was indicted in the Superior Court of Mecklenburg County, Charlotte, North Carolina for purportedly murdering Mrs. Foy Bell Cooper in the perpetration of a felony, to wit: rape (Murder in the first degree).

The jury returned a verdict of "guilty", and the judgment of the Court was that the petitioner was to die in the gas chamber at Central Prison, Raleigh, North Carolina.

The Appellant appealed to the North Carolina Supreme Court where the judgment of the lower Court was affirmed. (253 N. C. 86)

The Appellant filed a petition for rehearing in the North Carolina Supreme Court and the petition was denied.

The Appellant filed a petition for certiorari in the United States Supreme Court and the petition was denied.

The Appellant thereafter filed a petition for a Writ of Habeas Corpus in the Eastern District Court, Raleigh, North Carolina and the petition was denied.

On appeal to the Fourth Circuit Court of Appeals, the case was remanded to the District Court for a hearing after which the petition was again denied. Petitioner appealed to the Fourth Circuit Court of Appeals and the decision of the District Court was affirmed with Chief Judge Sobeloff and Judge Bell dissenting.

This case is before this Court on a Petition for Certiorari.

Statement of Facts

Appellant, an illiterate Negro and an escaped convict, was arrested on September 23, 1959 in Belmont, North Carolina, Gaston County, the county adjoining Mecklenburg County, and was turned over to the city police in Charlotte, North Carolina where he was held in the city jail incommunicado from said date until he confessed on October 6, 1959 to the murder of Mrs. Foy Bell Cooper whose dead body was found in a cemetery in Charlotte, North Carolina on the 20th day of September, 1959.

In the records of the arrest of the appellant, there was found an arrest sheet which gave instructions that the prisoner was not to talk to anyone nor was he permitted to use the telephone, (R.p. 110). Three of the officers, James W. Porter, Lt. Gilliland and Mr. Holmburg, went to

Belmont in the adjoining county and picked up the prisoner and it is admitted that one of them made out the arrest sheet ordering the prisoner to be held incommunicado and in explaining the mechanics of the arrest made, Captain John W. Yandell explained that "one copy of the arrest sheet is sent to the jailer and he governs himself accordingly". (R.p. 43).

The prisoner was held in jail for sixteen days and questioned constantly; taken out on various excursions in chains day and night, given two meals a day which consisted of two sandwiches each, and was not allowed to communicate with counsel or friends until after he had involuntarily confessed.

Questions Involved

1. Was the confession made by the Petitioner a voluntary confession as required by the Fourteenth Amendment to the United States or was it made under such circumstances that would vitiate the same as a coerced confession?

2. Was the Petitioner herein held incommunicado and denied his right to counsel in derogation of his rights under the Fourteenth Amendment to the United States Constitution?

ARGUMENT

The District Court Erred in Failing to Issue the Writ of Habeas Corpus and in Failing to Order Appellant Discharged From Custody Under the Death Sentence.

Petitioner, Elmer Davis, Jr., is being unconstitutionally restrained of his liberty because the confession relied upon to convict him was taken in derogation of petitioner's rights under the Fourteenth Amendment. The use in a state criminal trial of a defendant's confession obtained by coercion whether physical or mental is forbidden by the Fourteenth Amendment. See: *Brown* v. *State of Mississippi*, 297 US 278, 56 S. Ct. 461; *Linsenba* v. *People of State of California*, 314 US 219, 62 S. Ct. 472. Mr. Justice Frankfurter referring to coerced confessions and speaking for the majority in *Watts* v. *Indiana*, 338 US 49, 69 S. Ct. 1347 (1949) said, "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary."

The case at bar is simply another illustration of the use by the police of the custody of an accused to wring a confession from him. Here, the appellant, Elmer Davis, Jr., was arrested by the Belmont Police of Belmont, Gaston County, North Carolina on the 21st day of September, 1959

for being an escapee from a North Carolina Prison camp. The appellant on the same day was turned over to members of the Charlotte City Police Department for investigation of the murder of the late Foy Bell Cooper of Mecklenburg County, North Carolina. That the appellant was turned over to the Charlotte City Police Department for the sole purpose of interrogating him as to this murder is clearly shown by the conduct of the Charlotte police and by their arrest report of the defendant. See: *Petitioner's Exhibit No. 1,* (R.p. 110) which states that he was to be held in connection with this murder and was not to be allowed to see anyone or to use the telephone. Petitioner was then held by the Charlotte police from September 21 until October 6, 1959, a period of sixteen days, where he was forced to undergo prolonged and continuous questioning by a large staff of officers of the police department. Such relentless interrogation of petitioner continued for the entire period in which he was held, and ended only when the purported confession was obtained.

Numerous recent cases which deal with the question of the admissibility of confessions, point out that the very relentlessness of such prolonged interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. Such cases establish the principles that the turning of the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safe-guards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process. See: *Turner* v. *Pennsylvania,* 336 US 62, 69 S. Ct. 1352 (1949). *Harris* v. *South Carolina,* 338 US 68, 69 S. Ct. 1354 (1949).

The record clearly points up the fact that the statement of confession made by the petitioner was not volunteered. He testified himself that he was hungry, and when he asked to call his sister the officers placed him upstairs in a room all to himself where nobody could come up and see him (R.pp. 246-49).

Detective Fred Hucks verified the testimony of the petitioner (R.p. 318), where he states that the prisoner told him that he was hungry.

All of the officers deny that they violated the petitioner's constitutional rights when the facts show clearly otherwise. They attempt, however, to justify their conduct on the grounds that the prisoner was an escaped convict.

Captain John W. Yandell of the police department and custodian of the records said that one copy of the police report was given to the jailer and he is to govern himself accordingly (R.p. 43).

Captain W. A. McCall who is in charge of the detective division testified that he assigned the whole detective division of between 26 and 29 men to this case, and while he stated that he did not direct them to investigate or interrogate the prisoner periodically, his statement, "I talked to him, Mr. Gardner talked to him and Mr. Porter talked to him and Lt. Sykes talked to him. They talked to him at intervals when he would furnish information", suggest that there was some organized method of interrogating the prisoner and that his will was finally overcome.

It should be constantly borne in mind that Captain W. A. McCall was head of the detective division of the Charlotte Police Department and that his division was in charge of

investigating this case, and that while all of the officers deny the authorship of the arrest sheet, Captain McCall made it clear in no uncertain terms that he did not want the petitioner to see anybody, talk to anybody or communicate with any of his friends, relatives or legal advisor (R.p. 89). He attempts to justify isolating the petitioner on the grounds that he was an escaped convict and not entitled to visitors without permission of the North Carolina State Prison Warden, who could not grant same as he was at his office in Raleigh. Appellant asks the Court to take judicial notice of the fact that committed prisoners have certain times to see visitors. At all times, Captain McCall admits that Elmer, a suspect, was being held for investigation of the murder of Mrs. Cooper. We contend that Captain McCall's testimony alone illustrates that Elmer Davis was held incommunicado and in direct violation of his constitutional rights, in that Captain McCall, being head of the detective division, was in a position to make his wishes known and carried out by all the officers who were investigating this case.

Captain McCall further admits that even though Mr. Hucks and Mr. Fesperman were the two (2) officers assigned to the case, all of the detectives in the bureau were assigned to it also, since it was a major case. Thus when Elmer testified that he was held without privilege of seeing his relatives, friends, or counsel; that he was held for sixteen days without proper food; that he was interrogated both day and night by relays of officers and that he was struck, cursed, and continuously threatened for a period of sixteen days without proper food; his testimony is corroborated by the testimony of the head of the detective division.

This case has most of the elements which have been ruled on by the United States Supreme Court, as elements sufficient in themselves to constitute a violation of the Fourteenth Amendment's prohibition against coerced confessions and denial of counsel. The following elements were brought out in the Habeas Corpus hearing:

(a) The petitioner testified that he was held sixteen days without privilege of communicating with relatives or friends and this testimony was verified by the testimony of his sister who testified that she went to the city jail twice to see the petitioner and each time she was turned away (R.p. 246 and R.p. 220).

(b) He was held without privilege of communicating with counsel (R.p. 110).

(c) He was only fed two (2) to four (4) sandwiches per day until he confessed and he was constantly hungry throughout this period (R.p. 252).

(d) During the entire period, he was constantly threatened and beaten and placed in fear of bodily harm (R.p. 249).

(e) He was forced to walk a distance of fourteen (14) miles while handcuffed and during a period when he had been held without adequate food (R.p. 277 and R.p. 278).

(f) He was interrogated day and night by a large number of police officers (R.p. 35).

(g) He was carried on trips to the cemetery both day and night to view the scene of the murder (R.p. 339).

(h) On the day he signed the statement, he had been prayed over by a police officer at a time that his resistance was low and his body weary (R.p. 285).

The historical facts as found by the District Court illustrate a complete disregard for evidence as produced by the petitioner. One dramatic example of this is the Court's finding of fact number six. The petitioner's sister, Eloise Stowe, testified of two (2) attempts to see her brother before he confessed, but each time she was turned away, yet the District Court found as a fact that the petitioner was not held incommunicado. The Court went further and found that petitioner would have been allowed visitors had they come, even though the testimony of Mrs. Stowe remained uncontroverted. The Court further disregarded the testimony of the chief of detectives (R.p. 89) when he stated that he did not want the petitioner to see anyone.

The District Court determined the admissibility of this so-called confession based on its finding of historical facts, yet there was no mention in the Court's finding as to the effects of the fourteen mile walk forced on the petitioner. As it appears from the record of hearing, there are numerous other instances where the petitioner's evidence, though uncontradicted, was either disregarded altogether or passed over lightly by the District Court.

The uncontroverted portions of the record of the District Court hearing disclose that the appellant's, Elmer Davis, Jr., written confession was obtained in an atmosphere of substantial coercion and inducement created by the statements and actions of the Charlotte Police Department. It is well established that the question in each confession case such as this is whether the defendant's will was overborne

at the time he confessed. It is also well established that the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort, and the only method to determine whether a confession has been obtained unconstitutionally is by an examination of all of the attendant circumstances and facts of the particular case. In other words a totality of the circumstances must be examined and considered by the Court.

Chief Judge Sobeloff, then on the Fourth Circuit, pointed out the following: "The undisputed length of detention exceeds that in Turner v. Pennsylvania, 338 US 62 (1949) (four nights and five days); or Fikes v. Alabama, 352 US 191 (1957) (five nights and five days); or Reck v. Pate, 367 US 433 (1961) (three nights and four days); or Culombe v. Connecticut, 367 US 568 (1961) (four nights and five days); or Haynes v. Washington, 373 US 503 (1963) (sixteen hours)."

As the United States Supreme Court said in *Reck* v. *Pate*, 81 S. Ct. 1541, 367 US 433 (1961), "we conclude that this total combination of circumstances is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear". The right to counsel was established in *Escobedo* v. *Illinois* where the Court took the view that the period of police interrogation following arrest and prior to charge was a "critical" stage, and compelled the exclusion from a state criminal trial of a confession obtained from Escobedo following police denial of his request

to consult previously retained counsel, *Escobedo* v. *Illinois*, 378 US 478 (1964), *Gideon* v. *Wainwright*, 372 US 335 (1963).

Conclusion

WHEREFORE, the appellant prays, on the basis of the foregoing, that the decision of the Fourth Circuit Court be reversed and remanded in order that the writ be granted and the appellant released from custody under his sentence of death.

Respectfully submitted,

CHARLES V. BELL
112 South Irwin Avenue
Charlotte, North Carolina

WALTER B. NIVENS
235 South Brevard Street
Charlotte, North Carolina

CALVIN BROWN
235 South Brevard Street
Charlotte, North Carolina

Attorneys for Petitioner

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Supreme Court of the United States

October Term, 1965

No. 815

ELMER DAVIS, JR.,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA

DECISIONS BELOW

The Opinion of the Federal District Court of the United States for the Eastern District of North Carolina in this case, written by Judge Algernon L. Butler, United States District Judge, and an order denying the petition for a writ of habeas corpus were handed down and filed on July 21, 1961.

This case was passed upon by the Supreme Court of North Carolina in 1960, and is reported as STATE v DAVIS, 253 N.C. 86, 116 S.E. 2d 365 (1960).

A petition to the North Carolina Supreme Court for a rehearing was denied on November 18, 1960; and thereafter, a petition for writ of certiorari was filed with the United

States Supreme Court. Certiorari was denied on March 20, 1961. DAVIS v STATE OF NORTH CAROLINA, 365 U.S. 855, 81 S. Ct. 816.

The order of the Federal District Court of the United States for the Eastern District, written by Chief Judge Algernon L. Butler, United States District Judge, denying the petition for a writ of habeas corpus was entered on September 6, 1963. This order is attached as appendix to the Attorney General's Brief.

The U. S. Court of Appeals for the Fourth Circuit affirmed the District Court order on December 8, 1964.

JURISDICTION

Davis attempts to invoke the jurisdiction of this Court and the Federal District Court under the provisions of 28 USCA 2241, et seq., the same being Chapter 153 of 28 USCA, dealing with the issuance of Federal habeas corpus. Davis also invokes the jurisdiction of the Federal Courts by means of an attempted application of the Equal Protection of the Law and the Due Process of Law Clauses of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Davis attempts to bring his case within a portion of the Fourteenth Amendment of the Constitution of the United States, as quoted below:

> "***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES INVOLVED

The appropriate portion of 28 USCA 2241 is as follows:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their jurisdictions. The order of a circuit judge shall be entered in the record

of the District Court of the district wherein the restraint complained of is had.

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—* * * (3) He is in custody in violation of the Constitution or laws or treaties of the United States;".

QUESTION PRESENTED

Was Petitioner's confession, under the circumstances, voluntary and admissible as evidence?

SUMMARY OF ARGUMENT

The Court of Appeals properly affirmed the order of the District Court and in finding the confession voluntary and denying the writ for habeas corpus after giving Davis a full hearing and after consideration of all State records which were introduced by Davis into evidence. In fact, the plenary hearing conducted by the District Court was equivalent to a full blown trial *de novo*. This case has been fully litigated in the State Courts and in the Federal Courts, and the conclusion of the District Court and the Circuit Court that the confession was voluntary is amply supported by all the facts and evidence. Davis was not held incommunicado or denied his Right to Counsel.

FACTS IN CASE

Although the findings of facts set out in the Opinion of Judge Butler appears to be sufficient (Appendix, pp 12-21), the State of North Carolina urges that the evidence adduced at the hearing in the District Court and at the trial in the Superior Court of Mecklenburg County, a copy of which was admitted into evidence as part of the record in this hearing, amply supports findings of facts as suggested below:

Mrs. Foy Bell Cooper was murdered in a Charlotte cemetery in Mecklenburg County on September 20, 1959. (R.p. 7) At the time the murder was committed, Davis was an escapee from a State prison camp serving sentences of seventeen to twenty-five years for robbery and assault with intent to com-

mit rape. (R.p. 20) He was arrested in Gaston County the day after the murder, September 21, 1959, and held in the Belmont jail until policemen of the City of Charlotte came for him and took him to the Charlotte city jail where he remained until October 6, 1959, at which time he signed a statement admitting the commission of the murder. (R.p. 102)

The arrest slip or arrest card for Davis contained the words: "Date: 9/21/59. Hold for Hucks & Fesperman, R-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to use the telephone." (R.p. 110)

The cell was located on the first floor of the jail. (R.p. 163) Its dimensions were 6 x 10 feet. It contained a bunk, toilet facilities and a drinking fountain with running water. The area was well lighted and fans provided ventilation. (R.p. 165-168)

The only person Davis asked to see was Eloise Stowe, his sister. The officers went to her home, at least twice, and advised her that Davis wanted to see her. (R.p. 267) (R.p. 269) She stated she did not know when she could come because of having to care for her children. (R.p. 326) She finally visited Davis once after he had confessed. Davis did not ask to communicate with anyone else during the entire time from the day he was arrested until he confessed. (R.p. 101, 269)

At no time did Davis request counsel. (R.p. 92)

The jail food served Davis consisted of at least two sandwiches twice a day. (R.p. 281, 22) On occasion, upon request, he was brought a hot hamburger. On the day that he returned to Canton with the officers and walked from the suburbs of Canton to the suburbs of Asheville he was given a regular hot breakfast at the home of one of the detectives and he was given another meal in the middle of the day. (R.p. 314, 18) Davis told Dr. Nathaniel Tross, a Negro minister, that he was well treated while in jail and indicated that his food was satisfactory. Detective Hucks gave Davis peanuts, cigarettes and stuff all along while he was in jail (R.p. 22)

A shower facility was available to Davis outside the cells and he did take one shower. He could have had others if he had so requested.

Davis was questioned by officers once or twice a day for thirty minutes to an hour. (R.p. 17) Most of the questioning took place in the daytime and none after eleven o'clock at night. (R.p. 267, 273, 354) He was twice driven past the scene of the crime for the purpose of observing his reactions, and with Davis' consent. (R.p. 18)

Davis undertook to describe to the officers his escape route after he escaped from prison. The officers investigated the theft of certain articles of clothing which Davis had stolen. Davis claimed to have walked along the railroad tracks from the suburbs of Canton to the suburbs of Asheville. He agreed to go to Canton with the officers and retrace his route, in order to locate the places from which he had taken the panties and other clothes. (R.p. 315) One officer walked with Davis about thirteen or fourteen miles along the railroad tracks from the suburbs of Canton to the suburbs of Asheville, but the petitioner was unable to point out landmarks he had theretofore described. He had two regular meals, breakfast and lunch, that day. The shackles were removed from his legs before the walk started.

Questioning by the officers usually took place in the interrogation room, which was an office of the detective department and adjoined the jail. At no time was Davis questioned in his cell. (R.p. 277)

The officers did not threaten Davis. They did not curse or beat him. They did not abuse him either verbally or with physical violence. (R.p. 337, 338, 188) No promises were made to induce any confession. The Cooper murder was not mentioned to Davis from the time he was arrested until October 3 and, then, not again until October 6 when he confessed and signed a written confession. Davis was informed that he did not have to make any statement if he did not want to and that, if he did, it could be used against him. (R.p. 35, 36, 67)

On the day of the confession, Lieutenant Sykes, who had

not seen or talked to Davis before, walked into the room where officers were questioning Davis. After a few minutes conversation, Davis said he would like to talk to the Lieutenant alone. Lieutenant Sykes observed that Davis had a small Testament in his hand, such as is distributed by certain religious organizations whose representatives regularly visited prisoners in the jail. This prompted the Lieutenant, a lay preacher, to inquire whether Davis had been reading the Scriptures. Davis said he had. The Lieutenant asked if Davis had been praying, and he said that he did not know how to pray. The Lieutenant asked Davis if he would like for the Lieutenant to pray, and Davis said he would. The prayer was substantially as follows (pp 257-258 of Transcript—District Court):

> "O God, You are now a witness to and the watcher over both of us. I have been asked to pray. I want You to be with me in this prayer. I want You to watch over the person that is present with me; also be with me. I do not only ask prayers for myself, I ask for You to be with all people."

In a few minutes Davis made an oral confession of the murder and later, voluntarily, went with officers to the cemetery and re-enacted the commission of the crime. He signed a written confession which had been typed out on the basis of his oral confession. The signing of the confession by Davis was witnessed by several officers.

ARGUMENT

An analysis of the facts in this case clearly supports the conclusion that there was no act or circumstance or combination of acts or circumstances which amounted to a violation of due process of law with respect to the making of the confession of murder.

The jail house cell was sufficiently large, well lighted and ventilated. A drinking fountain with running water and toilet facilities were in the cell. A shower was available, on

request, outside the cell. Probably the facilities were superior to those to which Davis was accustomed when not in jail or prison. He seems to complain that in late September and October ordinary tap water was too hot to drink and too cold to take a bath in.

The detention was legal because Davis was an escapee from the State Prison System. Permission, by the State Prison authorities for the detention of Davis by the City of Charlotte Police Department, had been granted.

Davis was not questioned day and night for long periods by relay after relay of officers. The periods of questioning were not long and, according to Davis' own testimony, occurred only about twice a day. He was never questioned after eleven at night. It must be remembered that the officers were not only investigating the murder-rape of Mrs. Cooper, but they were investigating the escape and the larceny of certain articles which Davis had obtained by larceny and robbery. As a matter of fact, the officers did not mention the murder of Mrs. Cooper to Davis from the time of his arrest on September 21 until October 3 and then not again until October 6, the date of the confession.

Davis did not request counsel. The officers, on two different occasions, personally conveyed a message to Davis' sister that he wanted her to come to see him. There was no request to see anyone else.

It is submitted that two sandwiches twice a day supplemented by peanuts "and other stuff" was not such a poor diet, for an idle person doing no work, as to constitute a violation of due process of law.

It is further submitted that Davis' consenting to walk, and walking, thirteen or fourteen miles between Canton and Asheville along what he described as his escape route, in order to show the officers where he stole the panties and other clothes, does not constitute a violation of due process.

There were no threats, no cursing, no bright lights, no

rubber hose, no beatings, and no promises. In fact, Davis states that when he spoke of threats, he meant "cussing". He further defined abusive language as "nigger, nigger". Surely, Davis was not such a sensitive person, after all his years in prison, that "cussing" and being called "Nigger" constituted any degree of fear or coercion.

A glance at the prayer of the Lieutenant, set out above, shows that it was completely innocuous. No attempt was made to reach Davis through any improper appeal to or play upon his religious emotions and beliefs. The praper was offered at Davis' request. In his own words, "I'm part Christian."

Davis is not a respectable citizen suddenly and terrifyingly snatched from his home and rushed to jail for relentless, continuous questioning without rest and food for long periods of time.

Davis is a jailbird with abnormal and repulsive sexual desires. He is more at home in jail than out of jail. He said, "I have been in a lot of jails." In 1943 he was sentenced to two years in prison. Later, he served twelve months for breaking and entering. In 1946, he was convicted on two counts of housebreaking and larceny and fined $2,000 in each instance. About two weeks later, he was convicted again of breaking and entering and larceny and given four to five years. In 1950, he was convicted of assault with intent to commit rape and robbery and given 17 to 25 years, 16 of which remain to be served. He has known solitary confinement in the past. He has escaped from prison on several occasions.

The picture of Davis is not that of a sensitive soul whose proud and independent spirit was broken by eating jail food for 16 days—the usual, ordinary jail food such as all other jail prisoners were receiving—or by being incarcerated in a jail and by being questioned by officers from time to time as to his most recent, in a long series, of criminal activities.

Witness Nathaniel Tross, a Doctor of Theology, who at one

time had been a pastor in a church attended by Davis' family, visited Davis the day after he confessed and talked to him in private for about an hour. Dr. Tross specifically asked if he had been fed properly. Davis told him "that his treatment was very fine and that everybody was courteous and kind to him and that further they asked him if he needed anything like cigarettes or anything like that, and they were very deferential to him in that respect."

Davis contends, on page 7 of his brief, that the District Court's findings of historical facts illustrate a complete disregard of his evidence. What Davis has overlooked in such a statment is the principle that the Court is the trier of the facts; therefore, acting as a jury, the credibility of the witnesses is with the Court.

A comparison of Davis' testimony before the Superior Court of Mecklenburg County, in December, 1959, with his testimony before the District Court in February, 1963, reveals a great phenomenon—his memory for details and events has improved with the years. He now has total recall.

Not once during 41 pages of testimony in the Superior Court did Davis refer to any slapping or physical violence. Yet, in the District Court, such was his theme song. In the Superior Court, he testified the officers sometimes talked with him as much as twice a day. Yet, in the District Court, he played a tune of constant interrogation by numerous police officers at all hours of the day and night.

Davis told three different stories as to which officer "was going to fram hell out of him." In the Superior Court he identified Lt. Coy Sykes as the man. (Transcript, p 119)

In the District Court, Davis identified Capt. McCall as the officer who was going to "fram hell out of me". (Transcript, p 154). Then, when confronted on cross examination, Davis changed his story and identified Detective Porter as the only officer who had made the statement. (Transcript, p 187). Davis even admitted on page 188 of the Transcript that he

had lied in the Superior Court when he testified that the Lieutenant was the officer who made the statement.

The above are only a few of the inconsistencies which appear in Davis' testimony. When the two transcripts are compared, it is obvious that Davis has, during the years since his original trial, formulated a good story pointing toward force, coercion and fear.

Davis complains in his brief that the testimony of his sister, Eloise Stowe, failed to impress the District Court. How could Davis expect such testimony to be accepted. In her own words, she had not seen her brother for many years. She knew he was in jail and only went to see him once. She knew he was being tried for murder, yet she did not go to his trial. She knew the lawyers representing Davis. She had a telephone and did not call them. She was not interested in testifying for Davis until about a week before the hearing in District Court. A period of about four years elapsed before this witness, Davis or his two attorneys considered her testimony germane enough for her to testify. Surely, standing alone, her testimony would be suspect without any consideration of her demeanor on the witness stand.

The State of North Carolina adopts the Opinion and Order Denying Application for Writ of Habeas Corpus, as entered by Judge Butler on September 6, 1963. Not only did the District Court hear testimony of Davis and 12 witnesses, but before the Court was all the records of all prior hearings including records of the original trial in Superior Court, the North Carolina Supreme Court, United States Supreme Court, District Courts and Fourth Circuit.

The application for a writ of habeas corpus was properly denied by the District Court and its conclusion that the confession was the product of a rational intellect and free will, hence not involuntary or obtained in violation of due process, is more than amply supported by the evidence before the Court.

Respectfully submitted,

THOMAS WADE BRUTON
Justice Building
Raleigh, North Carolina
Attorney General of North Carolina

James F. Bullock
Justice Building
Raleigh, North Carolina
Assistant Attorney General

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL — NO. 1302

ELMER DAVIS, JR.)	
)	
v.)	OPINION AND ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS
)	
STATE OF)	
NORTH CAROLINA)	

This is an application for a writ of habeas corpus on behalf of Elmer Davis, Jr., now confined in the State Prison at Raleigh, North Carolina, under a sentence of death imposed by the Superior Court of Mecklenburg County, North Carolina, upon the applicant's conviction of murder while perpetrating the crime of rape.

The basis of the application is the admission of a confession in the state trial which the applicant contends was involuntary and obtained in violation of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution.[1] At the trial objection to the introduction of the confession on this ground was timely made and determined adversely to the applicant. The finding of the trial Judge was affirmed on appeal as supported by substantial evidence. State of North Carolina v. Davis, 1960, 253 N.C. 86, 116 S.E.2d 365, rehearing denied November 18, 1960, cert. denied, 1961, 365 U.S. 855, 81 S.Ct. 816, 5 L.Ed. 819. Thereafter, application was made to this court and relief was denied without a hearing upon consideration of the state court records. Davis v. State of North Carolina, D.C.N.C., 1961, 196 F.Supp. 488. The Fourth Circuit Court of Appeals, 310 F.2d 904, reversed and remanded for a hearing. Accordingly, a

[1] A written confession and several oral confessions were admitted in evidence at the trial. Inasmuch as the evidence reveals substantially similar attendant circumstances, the confessions are treated alike.

plenary hearing was held in order to determine the unresolved issues of fact surrounding the confession.

The facts in the case are sharply in dispute. The evidence offered at the time of trial is set out in the above-cited opinion of the North Carolina Supreme Court and is substantially the same as that produced at the hearing before this court.[2] Upon consideration of the record in the state court and the evidence offered at the hearing, the court finds the following historical facts:

1. On September 21, 1959, the day after the murder of Mrs. Foy Bell Cooper in Charlotte, North Carolina, Elmer Davis, Jr. was arrested and brought to the city jail in Charlotte, where he was held until October 6, 1959, the date of his confession.

2. At the time of arrest Davis was an escapee from a North Carolina prison where he was confined under sentences of 17 to 25 years for robbery and assault with intent to commit rape.[3] He was wearing clothing other than his prison uniform and had in his possession several articles of women's underwear and a billfold containing papers bearing the name of Bishel Buren Hayes.[4]

Davis had been previously convicted of five criminal offenses, including housebreaking and entering, larceny, robbery, and assault with intent to commit rape, and had served three prior prison sentences aggregating 7 to 8 years in addition to his current sentences of 17 to 25 years. He had escaped four times during his several prison terms, resulting in additional prison sentences. Davis was 29 years old. He had

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[2] All of the witnesses who testified at the state trial concerning the confession testified at the hearing on this application, and three additional witnesses: G. S. Ross and Harold Fesperman of the Charlotte Police Department, and Eloise Stowe, the applicant's sister.

[3] These offenses had been committed within two blocks of Elmwood Cemetery, the scene of the Cooper murder.

[4] Hayes testified at the state trial that he had been drinking heavily near Elmwood Cemetery on the day of the Cooper murder and that his billfold, shoes, and socks were taken from him while he was asleep.

completed the third or fourth grade, and from his testimony at the hearing he appeared to be of low average intelligence.

3. Upon taking Davis into custody, the police notified the State's Director of Prisons and obtained permission to hold the prisoner pending an investigation of the sources of the articles found in his possession at the time of arrest and his activities since his escape. At all times from September 21 through October 6, Davis was held under the authority of the North Carolina Director of Prisons and was serving the sentences from which he had escaped.

4. The Charlotte City Jail, where Davis was confined, is an "overnight" jail without facilities for the preparation of hot meals. Prisoners who are held by the Charlotte Police Department for more than a few days are generally confined in the Mecklenburg County Jail in Charlotte, where cooking facilities are available. Prisoners in the city jail are fed twice daily, each meal consisting of two or more sandwiches. While confined, Davis received food similar to that of other prisoners at regular intervals. During one day, he received two hot meals outside the jail and on another occasion received two hamburgers and milk. Periodically, he was provided with peanuts, soft drinks, cigarettes, and like items. On one occasion he informed the officers that he was hungry and they furnished him food. Otherwise, he made no complaint to the jailers who fed him or to the officers who talked with him that he was hungry or that the food was inadequate. Subsequent to October 6, he stated that he had been well-treated in this respect. There was no attempt by the police to weaken the prisoner by inadequate feeding.

5. The cell in which Davis was held was similar to the other cells in the jail, six by ten feet, equipped with a bed, mattress, drinking fountain, and commode. Ventilation was supplied by ceiling fans. Davis was permitted to use a shower bath located near his cell.

6. From September 21 through October 6, neither friend nor relative saw the applicant; however, he was not held

incommunicado and he would have been permitted visitors had they come to the city jail and requested to see him. Davis' sole request for visitors was to see his sister, Eloise Stowe, who lived in Charlotte. The officers to whom he made this request contacted his sister and conveyed this message to her. He made no request for counsel.

7. The investigation into the death of Mrs. Cooper was conducted by the Detective Division of the Charlotte Police Department, under the supervision of Captain W. A. McCall. The Cooper case was specifically assigned to Detectives W. F. Hucks and Harold Fesperman. From September 21 through October 6, Detectives Hucks and Fesperman talked with Davis once or twice daily. The interviews were conducted in the detectives' interrogation room of the city jail during the daytime and were approximately one hour long. Davis was a suspect in the Cooper case from the time of his arrest because of the nature and location of the crime; however, the questions prior to October 3 were directed to his background, the sources of the articles in his possession at the time of arrest, and the thefts and unlawful entries which Davis told the officers he had committed after his escape in the vicinity of Asheville, North Carolina. During this period the officers attempted to verify his statements, and Davis was taken to Asheville and vicinity in order to identify the scenes of the crimes to which he professed. Detective Homer C. Gardner, who had known Davis previously, assisted Hucks and Fesperman in the interrogation of Davis on three occasions.

8. On October 2 Detectives Jack W. Porter and W. O. Holmesberg questioned Davis for a short period of time on two occasions concerning his abnormal sex habits. During the afternoon of October 3 Detectives Porter and Holmesberg asked Davis if he would like to go out for some fresh air. They took Davis in an automobile through the Elmwood Cemetery, the scene of the rape-murder, but failed to observe any reactions.

On the afternoon of October 3 the Cooper case was men-

tioned to Davis for the first time. Detectives Holmesberg and Porter asked Davis if he knew why he was incarcerated. Davis replied that he believed it was because of the death of Mrs. Cooper. He was then asked if he committed the crime and he denied it.

9. On October 5 Davis was interrogated concerning the Cooper case a second time. Detective Hucks asked Davis what he knew about the murder and his whereabouts on September 20. He stated that he was in Belmont on that day. He again denied committing the crime.

10. On October 6, at about 12:30 p.m., Davis was questioned for the third time concerning the death of Mrs. Cooper. He was questioned by Detectives Hucks and Fesperman in the city jail in the office of Detective Lieutenant Sykes. Lieutenant Sykes, who had been on vacation during the period of Davis' confinement, came to his office during the questioning and requested that he be allowed to sit in. Sykes had known Davis' family and had talked with Davis some years before concerning other offenses. Davis was asked if he had anything to do with the murder and if he was in the cemetery on the day of the crime. He was asked where he had discarded his prison clothes and where he had obtained the clothing he was wearing and other items of personal property. Davis stated that he had discarded his prison clothes in the mountains when he escaped. He told the officers where he had obtained the clothing and other effects. He would not answer questions concerning the death of Mrs. Cooper. About 12:45 p.m. Lieutenant Sykes asked Davis if he would like to talk to any of the officers alone concerning the death of Mrs. Cooper. Davis stated that he would like to talk to Lieutenant Sykes. Hucks and Fesperman left the room. Sykes observed that Davis was holding a testament which had been distributed to prisoners by the local churches. Thereupon, the following colloquy occurred:

Sykes: "Elmer, have you been reading the scriptures?"

Davis: "I have."

Sykes: "Since you have been here have you also talked with your Almighty?"

Davis: "I have not; I do not know how to pray. I wish you would pray for me."

Sykes then offered the following prayer:

"O God, You are now a witness to and the watcher over both of us. I have been asked to pray. I want You to be with me in this prayer. I want You to watch over the person that is present with me; also be with me. I do not only ask prayers for myself, I ask for You to be with all people."

After a short period of silence following the prayer, the colloquy continued:

Davis: "I'd like to tell you something."

Sykes: "All right."

Davis: "I killed that woman."

Sykes: "What woman, Elmer?"

Davis: "The woman in the cemetery."

Sykes: "Do you want to tell me about it?"

Davis: "Yes, sir."

11. Davis thereupon orally confessed to the rape-murder of Mrs. Cooper and related the details of the crime.[5] Davis

[5] The oral confession, according to the testimony of Lieutenant Sykes, was as follows:

"He went ahead and related to me how he had gone to the cemetery. He told me how she was sitting on the bench; that he came up behind her and grabbed her and related how he carried her on beyond a large tombstone, and that he laid her on the ground, and that he believed in his opinion that her head had hit the corner of the tombstone; and that at that time he had unnatural relations with her; and that he picked her body up and carried her through a large hole that was in a fence that separated two sections of the cemetery, and carried her to a building and put her through a hole that was in the building and placed her on the floor inside; and that he left, and that she was bleeding when he left, but at the time he thought that she was still living." Transcript, p. 234.

then consented to accompany Sykes, Hucks, and Fesperman to the Elmwood Cemetery where he reenacted the crime.* Upon his return to the jail, Davis was asked by Chief of Police Jesse James whether he had been mistreated or if anything had been done to him that would cause him to make any statement against his own free will. Davis replied, "Chief, I have been treated all right." Davis then repeated his confession and the details of the crime in the presence of Captain McCall and Detectives Sykes, Hucks, Fesperman, Gardner, and Claude E. Davis, Jr., a police stenographer. The confession was typed and read to Davis. He affirmed the truth of the statements and signed the confession. Thereafter, he was taken to the Mecklenburg County Jail and formally charged with the murder of Mrs. Cooper.

12. From September 21 through October 6, Elmer Davis was neither beaten, threatened, nor cursed by the police. At the time of his written confession, he was advised of his right to remain silent and warned that any statement which he made could be used for or against him in a court of law, and he was informed of his right to counsel. The written confession also contained an admission that it was made freely and voluntarily.

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* Lieutenant Sykes described Davis' reenactment as follows:

"We proceeded under Elmer's directions to a spot in the cemetery. He informed us that that would be about as close as we could get in a car. We stopped the car under his direction, and he led us to a spot in the cemetery. He showed us a fence that he crossed over. The fence at that time had some shrubbery close to it and some small trees with limbs. He told us how he came over this fence. He showed us a cement bench that a lady was sitting on. He said she was an elderly lady and said, 'Her back was to me'; that she was reading a newspaper, and that he crept up behind her and grabbed her. And from the bench, with him leading us, he went possibly twenty-five or thirty feet . . . away and showed us a large tombstone. This tombstone possibly sat about four to five feet high and possibly three feet wide; and on the opposite side of that he told us that's where he dropped her on the ground, and that in his opinion her head struck the corner of this monument. He showed us in the position that her body was laying. He, himself, got on the ground and showed us after 'ripping or tearing', as he described it, a portion of her pants, he showed us the position that he placed his own self on the ground; and at that time the unnatural act takes place.

"He then led us to a large hole in the fence. I think this fence possibly stood about six feet high. The hole was in the center, and it was a good, large hole, and at the top of the fence there was barbed wire. He showed us how he went through the hole. . . . (H)e carried us to a little house that is called a mausoleum and told us that that is where he placed the body.

"After leaving there, he carried us to a piece of shrubbery . . . where he had thrown, I believe, her pocketbook . . . or other effects that belonged to her . . ." Transcript, pp. 235-6.

13. On October 7 Dr. J. S. Nathaniel Tross, a member of the colored race and Davis' former pastor, came to see Davis after reading an account of the confession in a local newspaper. Dr. Tross conferred with Davis privately. Davis told him that he had not been mistreated in the city jail; that everyone was kind and courteous to him; that he was properly fed, and that his statements, written and oral, and his reenactment of the crime, were voluntarily made. Davis further stated that he was moved by the prayer of Lieutenant Sykes to make the statement concerning the death of Mrs. Cooper.

The foregoing account of the external events and circumstances surrounding the confession constitute the background against which it must be appraised.

The test of the admissibility of a confession is whether "The confession is made freely, voluntarily, and without compulsion of any sort." Wilson v. United States, 1896, 162 U.S. 613, 623, 16 S.Ct. 895, 899. The question in each case is whether the will of the accused is so overborne at the time of the confession that his statement is not the product of a rational intellect and a free will. Reck v. Pate, 1961, 367 U.S. 433, 440, 81 S.Ct. 1541, 1546; Lynumn v. Illinois, 1963, ____ U.S. ____. 83 S.Ct. 917, 920. This question is to be answered with complete disregard of the truth or falsity of the statement. Rogers v. Richmond, 1961, 365 U.S. 534, 81 S.Ct. 735.

As was said in Haynes v. State of Washington, 1963, ____ U.S. ____, 83 S.Ct. 1336, 1344, "The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly * * * where it is necessary to make fine judgments as to the effect of psychological coercive pressures and inducements on the mind and will of an accused."

The concept of "voluntariness" has a two-fold aspect—the internal state of mind of the accused, and its effect when tested by legal standards. In determining the issue of voluntariness it becomes necessary, first, to recreate the mental state of the accused by inferences drawn from the historical

facts in order to determine how he reacted to the events and occurrences surrounding the confession; and, second, to apply the proper legal standards to the particular mental state thus recreated in order to determine the legal significance of how the accused reacted.[7]

The historical facts found in this case disclose that Davis is not a youthful, inexperienced, mentally defective or impressionable defendant, but on the contrary is an adult of mature years who has been convicted of several serious felonies and has been in prison almost continuously for the past sixteen years. At the time of his arrest as an escapee he was currently serving a 17 to 25 years sentence for robbery and assault with intent to commit rape.

He had had extensive experience with police procedures and was accustomed to prison confinement. His arrest and imprisonment as an escapee did not result in sudden separation from family and friends. His status as an arrested escapee distinguishes him from the ordinary suspect confined for interrogation and investigation. He was provided the customary food and accommodation supplied other prisoners. Considering his inactivity during the sixteen-day period, it cannot be said that the food was inadequate to sustain him.

Although Davis was interrogated daily, the questioning was not prolonged nor was it conducted by relays of officers.[8] On the contrary, only five officers questioned him prior to October 6, and the Cooper case was not mentioned until October 3. On the day of the confession Davis had been questioned approximately 15 minutes when Lieutenant Sykes offered his prayer. The prayer resulted from Davis' request and not from preconceived design. It was a simple supplication and, although Davis stated he was moved by the prayer, it cannot be inferred under all the circumstances that the prayer acted upon his religious hopes and fears so that the confession was the product of psychological coercion.

[7] See the discussion in Part IV of the opinion of Justice Frankfurter in Culombe v. Connecticut, 1961, 367 U.S. 568, 603, 81 S.Ct. 1860, 1879.

[8] Compare Turner v. Pennsylvania, 1949, 338 U.S. 62, 69 S.Ct. 1352.

It is a significant fact that, on the day following the confession, Davis told his former pastor during a private conference that he had been well-treated and that his confession was voluntary.

The Court concludes from the totality of circumstances in this case that the confession was the product of a rational intellect and a free will, and hence not involuntary or obtained in violation of due process.

The application for a writ of habeas corpus is hereby denied.

This 6th day of September, 1963.

s/ Algernon L. Butler
Chief Judge, U. S. District Court

SUPREME COURT OF THE UNITED STATES

No. 815.—October Term, 1965.

Elmer Davis, Jr., Petitioner, *v.* State of North Carolina.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 20, 1966.]

Mr. Chief Justice Warren delivered the opinion of the Court.

Petitioner, Elmer Davis, Jr., was tried before a jury in the Superior Court of Mecklenburg County, North Carolina, on a charge of rape-murder. At trial, a written confession and testimony as to an oral confession were offered in evidence. Defense counsel objected on the ground that the confessions were involuntarily given. The trial judge heard testimony on this issue, ruled that the confessions were made voluntarily, and permitted them to be introduced in evidence. The jury returned a verdict of guilty without a recommendation for life imprisonment, and Davis was sentenced to death.

The conviction was affirmed on appeal by the Supreme Court of North Carolina, 253 N. C. 86, 116 S. E. 2d 365, and this Court denied certiorari. 365 U. S. 855. Davis then sought a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. The writ was denied without an evidentiary hearing on the basis of the state court record. 196 F. Supp. 488. On appeal, the Court of Appeals for the Fourth Circuit reversed and remanded the case to the District Court for an evidentiary hearing on the issue of the voluntariness of Davis' confessions. 310 F. 2d 904. A hearing was held in the District Court, following which the District Judge again held that the confessions were voluntary. 221 F. Supp. 494. The Court of Appeals for the Fourth Circuit, after argument and then resubmission *en banc*,

affirmed with two judges dissenting. 339 F. 2d 770. We granted certiorari. 382 U. S. 953.

We are not called upon in this proceeding to pass on the guilt or innocence of the petitioner of the atrocious crime that was committed. Nor are we called upon to determine whether the confessions obtained are true or false. *Rogers* v. *Richmond*, 365 U. S. 534 (1961). The sole issue presented for review is whether the confessions were voluntarily given or were the result of overbearing by police authorities. Upon thorough review of the record, we have concluded that the confessions were not made freely and voluntarily but rather that Davis' will was overborne by the sustained pressures upon him. Therefore, the confessions are constitutionally inadmissible and the judgment of the court below must be reversed.

Had the trial in this case before us come after our decision in *Miranda* v. *Arizona*, *ante*, p. —, we would reverse summarily. Davis was taken into custody by Charlotte police and interrogated repeatedly over a period of 16 days. There is no indication in the record that police advised him of any of his rights until after he had confessed orally on the 16th day.[1] This would be clearly improper under *Miranda*. *Id.*, at —. Similarly, no waiver of rights could be inferred from this record since it shows only that Davis was repeatedly interrogated and that he denied the alleged offense prior to the time he finally confessed. *Id.*, at —.

We have also held today, in *Johnson* v. *New Jersey*, *ante*, p. —, that our decision in *Miranda*, delineating procedures to safeguard the Fifth Amendment privilege

[1] The written confession which Davis subsequently signed contained a notation that he was advised he did not have to make a statement and that any statement made could be used for or against him in court. A police officer testified at trial that he told Davis if the statement was not the truth he did not have to sign it.

against self-incrimination during in-custody interrogation is to be applied prospectively only. Thus the present case may not be reversed solely on the ground that warnings were not given and waiver not shown. As we pointed out in *Johnson*, however, the non-retroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken in circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). This Court has undertaken to review the voluntariness of statements obtained by police in state cases since *Brown* v. *Mississippi*, 297 U. S. 278 (1936). The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U. S. 1, 6–8 (1964).

The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. *Haynes* v. *Washington*, 373 U. S. 503, 510–511 (1963); *Culombe* v. *Connecticut*, 367 U. S. 568, 610 (1961); *Turner* v. *Pennsylvania*, 338 U. S. 62, 64 (1949). See also *Gallegos* v. *Colorado*, 370 U. S. 49, 54, 55 (1962). Thus, the fact Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary.

As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogations. Davis alleged that he was beaten, threatened, and cursed by police and that he was told he would get a hot bath and something to eat as soon as he signed a statement. This was flatly denied by each officer who testified.[2] Davis further stated that he had repeatedly asked for a lawyer and that police refused to allow him to obtain one. This was also denied. Davis' sister testified at the habeas corpus hearing that she twice came to the police station and asked to see him, but that each time police officers told her Davis was not having visitors. Police officers testified that, on the contrary, upon learning of Davis' desire to see his sister, they went to her home to tell her Davis wanted to see her, but she informed them she was busy with her children. These factual allegations were resolved against Davis by the District Court and we need not review these specific findings here.

It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness. *E. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 515–516 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199, 205 (1960); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 147–148 (1944). Wholly apart from the disputed facts, a statement of the case from facts established in the record, in our view, leads plainly to the conclusion that the confessions were the product of a will overborne.

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[2] The State adds in its brief: "Surely, Davis was not such a sensitive person, after all his years in prison, that 'cussing' and being called 'Nigger' constituted any degree of fear or coercion." Brief for Respondent, p. 8.

Elmer Davis is an impoverished Negro with a third or fourth grade education. His level of intelligence is such that it prompted the comment by the court below, even while deciding against him on his claim of involuntariness, that there is a moral question whether a person of Davis' mentality should be executed. Police first came in contact with Davis while he was a child when his mother murdered his father, and thereafter knew him through his long criminal record, beginning with a prison term he served at the age of 15 or 16.

In September 1959, Davis escaped from a state prison camp near Asheville, North Carolina, where he was serving sentences of 17 to 25 years. On September 20, 1959, Mrs. Foy Belle Cooper was raped and murdered in the Elmwood Cemetery in the City of Charlotte, North Carolina. On September 21, police in a neighboring county arrested Davis in Belmont, 12 miles from Charlotte. He was wearing civilian clothes and had in his possession women's undergarments and a billfold with identification papers of one Bishel Buren Hayes. Hayes testified at trial that his billfold and shoes had been taken from him while he lay in a drunken sleep near the Elmwood Cemetery on September 20.

Charlotte police learned of Davis' arrest and contacted the warden of the state prison to get permission to take Davis into their custody in connection with the Cooper murder and other felonies. Having obtained permission, they took Davis from Belmont authorities and brought him to the detective headquarters in Charlotte. From the testimony of the officers, it is beyond dispute that the reason for securing Davis was their suspicion that he had committed the murder.[4]

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[4] Some of the officers testified that they had no idea why Davis was being brought to Charlotte except as an escapee or in relation to the stolen goods in his possession. Captain McCall, who was in charge of the entire detective division of the Charlotte Police, stated

The second and third floors of the detective headquarters building contain lock-up cells used for detention overnight and occasionally for slightly longer periods. It has no kitchen facilities for preparing meals. The cell in which Davis was placed measures 6 by 10 feet and contains a solid steel bunk with mattress, a drinking fountain, and a commode. It is located on the inside of the building with no view of daylight. It is ventilated by two exhaust fans located in the ceiling of the top floor of the building. Despite the fact that a county jail equipped and used for lengthy detention is located directly across the street from detective headquarters, Davis was incarcerated in this cell on an upper floor of the building for the entire period until he confessed.[4] Police Chief Jesse James testified: "I don't know anybody who has stayed in the city jail as long as this boy."

When Davis arrived at the detective headquarters, an arrest sheet was prepared giving various statistics concerning him. On this arrest sheet was typed the following illuminating directive: "HOLD FOR HUCKS & FESPERMAN RE-MRS. COOPER. ESCAPEE FROM HAYWOOD COUNTY STILL HAS 15 YEARS TO PULL. DO NOT ALLOW ANYONE TO SEE DAVIS. OR ALLOW HIM TO USE TELEPHONE." Both at trial and at the habeas corpus hearing the testimony of police officers on this notation was nearly uniform. Each

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at trial, however: "He was brought over here for the purpose of being an escaped convict and as a likely suspect in the murder case . . . . We were not holding him for the State when he was in Gaston County jail, but were making an investigation in reference to our murder case." At the habeas corpus hearing, he testified: "[H]e was in our custody primarily because he was a suspect in Mrs. Cooper's case . . . ." Davis' prior offenses included an assault in the vicinity of the cemetery, and his home had been nearby. See also note 9, *infra*.

[4] The only exception to this incarceration was a day spent near Asheville, described *infra*, and a night in the Asheville jail.

officer testified that he did not put that directive on the arrest sheet, that he did not know who did, and that he never knew of it. The police captain first testified at trial that there had never been an order issued in the police department that Davis was not to see or talk to anybody. He cited as an example the fact that Davis' sister came to see him (after Davis had confessed). He testified later in the trial, however:

> "I don't know, it is possible I could have ordered this boy to be held without privilege of communicating with his friends, relatives and held without the privilege of using the telephone or without the privilege of talking to anybody. . . . No, I did not want him to talk to anybody. For the simple reason he was an escaped convict and it is the rules and regulations of the penal system that if he is a C grade prisoner he is not permitted to see anyone alone or write anyone letters and I was trying to conform to the state regulations." [5]

The District Court found as a fact that from September 21 until after he confessed on October 6, neither

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[5] Transcript of Evidence on Appeal. His testimony at the habeas corpus hearing was very similar. He first stated somewhat confusingly:

"Inasmuch as he was an escaped convict, I would have asked them what was the purpose of placing this do not allow anyone to see Davis or allow him to use the telephone. To be perfectly honest with you, why put it in writing when you can do the same thing verbally. I mean there is no question about it. The question is that each individual is allowed due process of law. And if they had been asked in any way or if I had been asked for anyone to see Elmer, they would have been given permission. Nobody asked to my knowledge."

He later testified:

"I didn't want anybody to talk to him without me knowing it as he was a prisoner of the State of North Carolina, and he was a C grade prisoner and not entitled to visitors without the permission of the warden."

friend nor relative saw Davis. It concluded, however, that Davis was not held incommunicado because he would have been permitted visitors had anyone requested to see him. In so finding, the District Court noted specifically the testimony that police officers contacted Davis' sister for him. But the court made no mention whatever of the notation on the arrest sheet or the testimony of the police captain.

The stark wording of the arrest sheet directive remains, as does Captain McCall's testimony. The denials and evasive testimony of the other officers cannot wipe this evidence from the record. Even accepting that police would have allowed a person to see Davis had anyone actually come, the directive stands unassailably as an indicium of the purpose of the police in holding Davis. As the dissenting judges below stated: "The instruction not to permit anyone access to Davis and not to allow him to communicate with the outside world can mean only that it was the determination of his custodians to keep him under absolute control where they could subject him to questioning at will in the manner and to the extent they saw fit, until he would confess." 339 F. 2d, at 780. Moreover, the uncontested fact that *no one* other than the police spoke to Davis during the 16 days of detention and interrogation that preceded his confessions is a significant factor in the determination of voluntariness.

During the time Davis was held by Charlotte police, he was fed two sandwiches, described by one officer as "thin" and "dry," twice a day. This fare was occasionally supplemented with peanuts and other "stuff" such as cigarettes brought to him by a police officer.[6] The

[6] During the 16-day period, this diet varied only for two meals on the day he was taken to Asheville and on one other occasion when an officer brought him two hamburgers.

District Court found that the food was the same served prisoners held overnight in the detention jail and that there was no attempt by police to weaken Davis by inadequate feeding. The State contends that "two sandwiches twice a day supplemented by peanuts 'and other stuff' was not such a poor diet, for an idle person doing no work, as to constitute a violation of due process of law." Brief for Respondent, p. 7.

We may readily agree that the record does not show any deliberate attempt to starve Davis, compare *Payne* v. *Arkansas*, 356 U. S. 560 (1958), and that his diet was not below a minimum necessary to sustain him. Nonetheless, the diet was extremely limited and may well have had a significant effect on Davis' physical strength and therefore his ability to resist. There is evidence in the record, not rebutted by the State, that Davis lost 15 pounds during the period of detention.

From the time Davis was first brought to the overnight lock-up in Charlotte on September 21, 1959, until he confessed on the 16th day of detention, police officers conducted daily interrogation sessions with him in a special interrogation room in the building.[7] These sessions each lasted "forty-five minutes or an hour or maybe a little more," according to one of the interrogating officers. Captain McCall testified that he had assigned his entire force of 26 to 29 men to investigate the case. From this group, Detectives Hucks and Fesperman had primary responsibility for interrogating Davis. These officers testified to interrogating him once or twice each day throughout the 16 days. Three other officers testified that they conducted several interrogation sessions at the request of Hucks and Fesperman. Although the officers denied

[7] As the Police Chief explained: "An interrogation room should be void of all materials so that you can talk to a man in complete quiet and keep his attention."

that Davis was interrogated at night, one testified that the interrogation periods he directed were held some time prior to 11 p. m.[8] Captain McCall also interrogated Davis once.

According to each of the officers, no mention of the Cooper murder was made in any of the interrogations between September 21 and October 3. Between these dates they interrogated Davis extensively with respect to the stolen goods in his possession. It is clear from the record, however, that these interrogations were directly related to the murder and were not simply questioning as to unrelated felonies. The express purpose of this line of questioning was to break down Davis' alibis as to where he had obtained the articles. By destroying Davis' contention that he had taken the items from homes some distance from Charlotte, Davis could be placed at the scene of the crime.[9]

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[8] After the officer admitted that the sessions might have been up to 11 p. m., the following question was posed and answered:

"Q. Well, he could have been interrogated by you at night, couldn't he?

"A. I'll say no and I'll say yes."

Another officer testified as follows:

"Q. At the time you interrogated him up in the Police Department, was it daylight or dark?

"A. Well, it could have been both, if I remember correctly. I'll just leave it that way: it could have been both, because that's the way it is."

[9] Further graphic evidence of the obvious purpose of the police in detaining and repeatedly interrogating Davis is found in statements made to the press during this period:

"Detective Capt. W. A. McCall said Davis had not implicated himself in the Sunday slaying.

"'We're still talking to him,' he said." Charlotte Observer, Sept. 23, 1959, B-1.

"A Negro man was seen crouching in the bushes at Elmwood Ceme-

In order to put pressure on Davis with respect to these alibis, police took him from the lock-up on October 1 to have him point out where he had stolen the goods. Davis had told the officers that he took the items from houses along the railroad line between Canton and Asheville. To disprove this story, Davis was aroused at 5 a. m. and driven to Canton. There his leg shackles were removed and he walked on the railroad tracks, handcuffed to an officer, 14 miles to Asheville. When Davis was unable to

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tery shortly before the rape-slaying of an elderly widow there Sunday afternoon, Charlotte detectives said Wednesday.

. . . . . .

"Charlotte detectives . . . continued interrogating E. J. Davis, the escapee who was arrested in Belmont Monday night.

. . . . . .

"'We questioned him twice today,' Capt. McCall said Wednesday night. 'He has given us some conflicting information and we're checking all his alibis.'

"'We'll give him a lie detector test if necessary. But so far we have had no positive results from our interrogation.'" Charlotte Observer, Sept. 24, 1950, B-1.

"'Everybody . . . everybody is a suspect in this case until we sign a murder warrant.'

"Detective Capt. W. A. McCall spoke these words Thursday as police continued their search for the man who killed and raped a 78-year-old widow in a local graveyard Sunday afternoon.

. . . . . .

"But the main emphasis Thursday continued to be on E. J. Davis, a 32-year-old Negro prison escapee who was convicted of raping an elderly woman here in 1949.

"Davis was questioned at length Thursday for the third straight day.

"'We know he's telling us some lies,' Capt. McCall said. 'We're checking every alibi and every story he gives us, and some of them just aren't true.'

"'We don't have enough facts yet to give him a lie detector test though.'" Charlotte Observer, Sept. 25, 1950, B-1.

"Being questioned presently in connection with the slaying of 78-year-old Mrs. Foy Belle Cooper is E. J. Davis, a 32-year-old

recognize any landmark along the way or any house that he had burglarized, an officer confronted him with the accusation that his story was a lie. The State points out that Davis was well fed on this day, that he agreed to make the hike, and contends that it was not so physically exhausting as to be coercive. The coercive influence was not, however, simply the physical exertion of the march, but also stemmed from the avowed purpose of that trek—to break down his alibis to the crime of murder.

On the afternoon of October 3, two officers planned and carried out a ruse to attempt to get Davis to incriminate himself in some manner. They engaged Davis in idle conversation for 10 to 20 minutes and then inquired whether he would like to go out for "some fresh air." They then took Davis from the jail and drove him into the cemetery to the scene of the crime in order to observe his reaction.

The purpose of these excursions and of all of the interrogation sessions was known to Davis. On the day of the drive to the cemetery, the interrogators shifted tactics and began questioning Davis specifically about the

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Negro escapee who was arrested Monday in Belmont. Davis has a prior record for rape in 1949." Charlotte Observer, Sept. 26, 1959, B-1.

"Charlotte detectives concentrated Monday on a 32-year-old escaped convict in an effort to find who raped and murdered a 78-year-old widow here a week ago.

. . . . . .

"Davis had been questioned closely several times in connection with the rape-slaying of Mrs. Foy Belle Cooper, 78." Charlotte Observer, Sept. 29, 1959, 14-A.

"City detectives were still probing a man's alibis for loopholes Friday in an investigation into the rape-slaying of a 78-year-old white woman in Charlotte Sept. 20.

"The suspect is an escaped convict, E. J. Davis. . . ." Charlotte Observer, Oct. 3, 1959, B-1.

murder.[10] They asked him if he knew why he was being held. He stated that he believed it was with respect to the Cooper murder. Police then pressed him, asking, "Well, did you do it?" He denied it. The interrogation sessions continued through the next two days. Davis consistently denied any knowledge of the crime.[11]

On October 6, Detectives Hucks and Fesperman interrogated Davis for the final time. Lieutenant Sykes, who had known Davis' family, but who had not taken part in any of the prior interrogation sessions because he had been away on vacation, asked to sit in. During this interrogation, after repeated earlier denials of guilt, Davis refused to answer questions concerning the crime. At about 12:45 p. m., Lieutenant Sykes inquired of Davis if he would like to talk to any of the officers alone about Mrs. Cooper. Davis said he would like to talk to Sykes. The others left the room. Lieutenant Sykes then asked Davis if he had been reading a testament which he was holding. Davis replied that he had. Sykes asked Davis if he had been praying. Davis replied that he did not know how to pray and agreed he would like Sykes to pray for him. The lieutenant offered a short prayer. At that point, as the dissent below aptly put it, the prayers of the police officer were answered—Davis confessed. He was driven to the cemetery and asked to re-enact the crime. Police then brought him back to

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[10] Although the District Court found that police did not interrogate Davis directly about the Cooper case until October 3, the testimony was not uniform on this point. There is testimony in the record by police officers that the first interrogation about the murder was on the Friday before he confessed—October 2, 1959. See 253 N. C. 88, 90, 116 S. E. 2d 365, 367. See also Charlotte Observer, Oct. 7, 1959, A–1, Oct. 8, 1959, B–1.

[11] Although the record does not show the tenor of the interrogation on October 4, it is established that Davis was interrogated every day and that he denied any connection with the crime until October 6.

the station where he repeated the confession to several of the officers. In the presence of six officers, a two-page statement of the confession Davis had made was transcribed. Although based on the information Davis had given earlier, Captain McCall dictated this statement employing his own choice of format, wording, and content. He paused periodically to ask Davis if he agreed with the statement so far. Each time Davis acquiesced. Davis signed the statement.[12] Captain McCall then contacted the press and stated, "He finally broke down today." [13]

The concluding paragraph of this confession, dictated by the police, contains, along with the standard disclaimer that the confession was free and voluntary, a statement that unwittingly summarizes the coercive effect on Davis of the prolonged period of detention and interrogation. It reads:

> "In closing, I want to say this. I have known in my own mind that [*sic*] you people were holding me for, and all the time I have been lying in jail, it has been worrying me, and I knew that sooner or later, I would have to tell you about it.
>
> "I have made this statement freely and voluntarily. Captain McCall has dictated this statement in the presence of Detectives W. F. Hucks, E. F.

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[12] After Davis signed the written confession, Police Chief Jesse James appeared to question Davis about his treatment. In response to this questioning, Davis stated that he had been treated all right. The following morning, a minister who knew Davis' family and had read of his arrest 16 days earlier in the newspaper, appeared to talk to Davis. He testified that Davis told him his treatment had been very fine and that everyone had been courteous and kind to him. The minister indicated further that he often cooperated with police in such matters.

[13] Charlotte Observer, Oct. 7, 1959, A-1.

Fesperman, H. C. Gardner, C. E. Davis, and Detective Lieutenant C. L. Sykes. I am glad it is over, because I have been going thru a big strain."

The facts established on the record demonstrate that Davis went through a prolonged period in which substantial coercive influences were brought to bear upon him to extort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court. *E. g., Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Fikes* v. *Alabama*, 352 U. S. 191 (1957); *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949). We have never sustained the use of a confession obtained after such a lengthy period of detention and interrogation as was involved in this case.

The fact that each individual interrogation session was of relatively short duration does not mitigate the substantial coercive effect created by repeated interrogation in these surroundings over 16 days. So far as Davis could have known, the interrogation in the overnight lock-up might still be going on today had he not confessed. Moreover, as we have noted above, the fact that police did not directly accuse him of the crime until after a substantial period of eroding his will to resist by a tangential line of interrogation did not reduce the coercive influence brought to bear upon him. Similarly, it is irrelevant to the consideration of voluntariness that Davis was an escapee from a prison camp. Of course Davis was not entitled to be released. But this does not alleviate the coercive effect of his extended detention and repeated interrogation while isolated from everyone but the police in the police jail.

In light of all of the factors discussed above, the conclusion is inevitable—Davis' confessions were the invol-

untary and product of coercive influences and are thus constitutionally inadmissible in evidence. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit must be reversed and the case remanded to the District Court. On remand, the District Court should enter such orders as are appropriate and consistent with this opinion, allowing the State a reasonable time in which to retry petitioner.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 815.—October Term, 1965.

Elmer Davis, Jr., Petitioner, v. State of North Carolina. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 20, 1966.]

Mr. Justice Clark, with whom Mr. Justice Harlan joins, dissenting.

The rationale of the Court's opinion is that Davis, "an impoverished Negro with a third or fourth grade education," was overborne when he gave his confession to the rape-murder.

Davis, a 39-year-old man, admits that he has "been in a lot of jails." The record indicates that his intelligence was far above that of a fourth grader. His own testimony at his trial reveals a highly retentive memory. He described in detail his numerous arrests, convictions, prison sentences, and escapes over a 15-year span. Furthermore, during the federal habeas corpus hearing Davis showed his awareness of legal technicalities. At one point the prosecutor sought to cross-examine Davis as to whether he had "been tried and convicted of various offenses." Despite the fact that there was no objection to the question by his lawyer, Davis turned to the judge and said: "Your Honor, do I have to answer that question? This is in the past." After some argument about the admissibility of the evidence, the judge recessed the hearing for 10 minutes to give counsel an opportunity to present legal authority. Davis' objection was thereafter sustained.

This case goes against the grain of our prior decisions. The Court first confesses that the rule adopted under

the Fifth Amendment in *Miranda* v. *Arizona*, — U. S. —, *i. e.*, that an accused must be effectively advised of his right to counsel before custodial interrogation, is not retroactive and therefore does not apply to this case. See *Johnson* v. *New Jersey*, *ante*, p. —. However, it obtains the same result by reading the Due Process Clause as requiring that heavy weight must be given the failure of the State to afford counsel during interrogation as "a significant factor in considering the voluntariness of statements." Through this change of pace Davis' guilty handwriting is stamped a forgery and his conviction is reversed.

I have found no case dealing with lengthy detention by state officers which supports reversal here. The Court cites three: *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Fikes* v. *Alabama*, 352 U. S. 191 (1957), and *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949), all of which were treated in terms of due process. But these cases are clearly distinguishable on their facts with respect to the character of the accused and the circumstances under which interrogation took place. Culombe was a "mental defective of the moron class" who had twice been in state mental institutions. He had no previous criminal record. Fikes was "a schizophrenic and highly suggestible." He had only one prior conviction—for burglary. The interrogation of both these men was more concentrated than that of Davis. Turner was subjected to continual interrogation by a relay of officers, falsely told that others had implicated him, and not permitted to see his family or friends. The prosecutor admitted that his arraignment was delayed, in violation of a state statute, until the police could secure a confession. Turner had no prior criminal record.

On the other hand, Davis had a long criminal record. At the time of his arrest he was an escapee from state

prison, and so could be properly held in custody. It is therefore wrong to compare police conduct here to the detention of an ordinary suspect until he confesses. Moreover, the sporadic interrogation of Davis can hardly be denominated as sustained or overbearing pressure. From the record it appears that he was simply questioned for about an hour each day by a couple of detectives. There was no protracted grilling. Nor did the police officers operate in relays.

The Court makes much of an "arrest sheet" which informed the jailer that Davis was being held in connection with the murder of Mrs. Cooper and that he was an escape convict. This sheet further directed: "Do not allow anyone to see Davis. Or allow him to use telephone." No witness was able to identify the author of this notation. It is true Captain McCall said that he "might" have done it. But he said that, even so, it was merely a notice to the jailer that Davis was an escapee and, therefore, not permitted to see or talk to anyone. To the contrary, however, the record shows that Davis was not held incommunicado. Upon his request, the police located his sister the second day after his arrest, informed her that Davis was in custody, and on two separate occasions invited her to visit him. The officers first called on his sister for the sole purpose of telling her that Davis wished to see her. A few days later they also asked whether she was missing any of the clothes which were found on Davis. He made no request to see anyone else. Moreover, it is undenied that visitors from churches and schools entered the jail with scripture pamphlets. And Davis had one of these booklets in his hands the day of his confession.

Witnesses testified that Davis had told them that his treatment was "very fine and that everybody was courteous and kind to him." As for the hike of some 14 miles

along the railroad tracks, Davis described the purpose of it clearly:

> "Well, we had some clothes and things, what I took up there, and we wanted to go up there and get it straightened out; but the place where I took the stuff I couldn't locate the place because it was at night, you understand, when I took the clothes and things off the line."

As to the "prayer" of Lieutenant Sykes, there is no testimony whatever that it was in any way "coercive." Indeed, one witness, Davis' preacher, quoted him as saying "that he had nothing but praise for Lieutenant Sykes, especially in the way he dealt with him." At another point the parson testified: "Elmer told me that he appreciated the prayer of Lieutenant Sykes." The Court disregards the fact that Davis had a copy of the scriptures in his hands when Sykes came into the room and continued to hold them as they talked. After Sykes—a lay preacher—noticed the testament, it was only natural that the conversation would turn to the scriptures and prayer. Sykes asked if Davis wished him to give a prayer. Davis said that he would, and Sykes prayed with him. The prayer was entirely unsuggestive.

It is said also that the food was not sufficient. But the uncontradicted evidence is that Davis never complained about the meals he received while in custody.* Davis testified that he lost 15 pounds in jail. But this does not warrant a finding that he was improperly fed. No one could contradict or substantiate this contention because the record does not show that his weight was taken upon arrest. And Davis was found to be untruth-

*On the morning that Davis left the jail to walk along the railroad tracks, a police officer asked him "if he was hungry," and his natural reply at that time of day was "yes." The officer then gave Davis breakfast.

ful in most of his testimony. Indeed, Davis did not paint his treatment with a black brush until his habeas corpus hearing, although he testified at length at his trial in the state court.

In these circumstances, it appears to me that the trial judge's findings cannot be found to be clearly erroneous. To the contrary, they are fully supported by the entire record. I would affirm.